(26,562)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 479.

INTERNATIONAL PAPER COMPANY, PETITIONER,

vs.

THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, &c.; FLORENCE G. PAYNE, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1918.

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a United States Circuit Court of Appeals for the Second Circuit.

INTERNATIONAL PAPER COMPANY, Libelant-Appellee,

against

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc.; FLORENCE G. PAYNE, Claimant-Appellant.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern District of New York.

United States Circuit Court of Appeals, Second Circuit. Filed Feb. 13, 1918. William Parkin, Clerk.

Office Supreme Court U. S. Filed Jun- 1, 1918. James D. Maher Clerk.

1 United States District Court, Southern District of New York.

INTERNATIONAL PAPER COMPANY, Libelant-Appellee,

against

THE SCHOONER "GRACIE D. CHAMBERS," Her Tackle, etc.; FLORENCE G. PAYNE, Claimant-Appellant.

Statement.

1917.
Oct. 30. Libel filed.
Nov. 9. Answer filed.
Nov. 13. Case tried before Hon. Augustus N. Hand.
Dec. 28. Decision rendered granting decree for Libelant for $5,845, with interest from October 4th, 1917, and costs. Opinion by A. N. Hand, J.
1918.
Jan. 9. Final decree entered.
Jan. 11. Claimant's Notice of Appeal filed.
Jan. 11. Assignment of Errors filed.

2 *Libel.*

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Libel and Complaint of International Paper Company against the Schooner or vessel Gracie D. Chambers, her tackle, apparel, ap-

purtenances and furniture, and against all persons intervening for their interest therein, in a cause of contract, civil and maritime, alleges as follows:

First. That libelant, International Paper Company, now is and at all times hereinafter mentioned was a domestic corporation, duly incorporated and existing under and by virtue of the laws of the State of New York, with an office in the City of New York, and Southern District of New York, and was at all times and still is engaged in the business of manufacturing and selling paper of various sorts.

Second. That the Schooner Gracie D. Chambers is now within the port of New York, and within the jurisdiction of this honorable Court.

Third. On or about September 21, 1917, T. F. Wilmot & Co., a co-partnership, doing business in New York City, and the Southern District of New York, as ship brokers and general forwarding agents, and agents for said International Paper Company, shipped on board said schooner Gracie D. Chambers, then lying in the port of New York, to be carried and transported in said schooner to the port of Bordeaux, France, and consigned and to be delivered to "La France" in that city, 120 tons of news print paper, for freight charges amounting to $5,845.00 to be paid by said T. F. Wilmot & Co., the said T. F. Wilmot & Co. receiving therefor, from the Master of said schooner, a bill of lading, whereby and wherein the said
3 Master charged himself and the said vessel, her tackle, apparel, appurtenances and furniture for the performance of said contract. A copy of said bill of lading is hereto annexed and made a part of this libel.

Fourth. On or about October 1, 1917, said T. F. Wilmot & Co., acting as agents for said International Paper Company, upon demand of the Commercial Forwarding Company, shipowners and freight forwarders, doing business in New York City, and the Southern District of New York, the owners or charterers of said schooner Gracie D. Chambers, paid the sum of $5,845 to the said Commercial Forwarding Company, being the amount of freight money due under said contract.

Fifth. That at all the times hereinbefore mentioned the said T. F. Wilmot & Co. has always and in all things acted on behalf and as agent of the libelant, and that said payment to the said Commercial Forwarding Company was made on behalf and account of the libelant.

Sixth. That on or about October 4, 1917, said T. F. Wilmot & Co. called upon the libelant for reimbursement for said payment to said Commercial Forwarding Company on its behalf, and the libelant thereupon paid said sum of $5,845 to said T. F. Wilmot & Co., as it was legally bound to do.

Seventh. Upon information and behalf, that on or about October 6, 1917, and while the said schooner was lying in the stream and ready for sailing, the Government of the United States, through the Navy Department and the Export Administrative Board, issued an order forbidding the clearance of any sailing vessels for

voyages to ports which necessitated the passing of such vessels through the ocean war zones declared by the Imperial Government of Germany, and in consequence thereof said schooner Gracie D. Chambers has been refused clearance from the port of New York and has been unable to sail or depart on her said voyage to Bordeaux, France, but is forced to remain and still does remain in the port of New York. And in further consequence thereof said schooner abandoned her said voyage to Bordeaux, France, and has discharged the whole of her cargo, with the purpose of reloading for a new and different voyage, and Commercial Forwarding Company has notified T. F. Wilmot & Co. to retake possession of said 120 tons of news print paper, and said T. F. Wilmot & Co., in accordance with said notice, received said paper from the Gracie D. Chambers for the account of the libelant.

Eighth. That said freight charges amounting to $5,845 have not been earned by said Gracie D. Chambers and the said sum and the whole of it now remains unpaid and owing to the libelant, to its damage $5,845.

Ninth. Upon information and belief, that said schooner is a foreign vessel, and is about to leave this port, so that the libelant will be without remedy except by proceedings against said vessel, her tackle, apparel, appurtenances and furniture.

Tenth. All and singular the premises are true, and within the Admiralty and maritime jurisdiction of the United States and of this honorable Court.

Wherefore, the libelant prays that process in due form of law, according to the course of this Court in cases of Admiralty and maritime jurisdiction, may issue against the said schooner, her tackle, apparel, appurtenances and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable Court would be pleased to declare the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, and that the libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

STETSON, JENNINGS & RUSSELL,
Proctors for Libelant.

15 Broad Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

F. G. Simons, being duly sworn, deposes and says:

That he is Secretary of the International Paper Company, the libelant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by

libelant is because libelant is a corporation and deponent is an officer thereof, to wit, its Secretary.

6 That the sources of deponent's information and the grounds of his belief as to all matters not therein stated to be alleged upon his own knowledge are reports and papers relating to the subject-matter thereof in the possession of said libelant.

F. G. SIMONS.

Sworn to before me this 29 day of October, 1917.

[L. S.] E. W. KENNEDY,
Notary Public, No. 36, Kings County.

Certificate filed in New York County.

Copy of Bill of Lading—See Libelant's Ex. No. 1, printed at p —.

7 *Answer.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Florence G. Payne, owner and claimant of the schooner or vessel Gracie D. Chambers, her tackle, etc., as the same is proceeded against under the libel and complaint of International Paper Company, in a cause of contract, civil and maritime, alleges as follows:

First. The claimant denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the First article of the libel.

Second. The claimant admits the allegations of the Second article of the libel.

Third. The claimant admits the allegations of the Third article of the libel, and for further particulars as to the terms and conditions of the bill of lading beg- leave to refer to the original, or to the copy thereof annexed to the libel herein.

Fourth. The claimant admits the allegations of the Fourth article of the libel.

Fifth. The claimant denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Fifth article of the libel.

Sixth. The claimant denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Sixth article of the libel.

Seventh. The claimant admits the allegations contained in the Seventh article of the libel, except that the claimant denies that the order of the Government of the United States there referred to was issued on or about October 6th, 1917, and alleges, upon

8 information and belief, that the said order was issued on or about September 28th, 1917, and was put into effect at the Port of New York early on the morning of September 29th, 1917.

Eighth. The claimant denies each and every allegation contained in the Eighth article of the libel.

Ninth. The claimant denies each and every allegation contained in the Ninth article of the libel, except that the claimant admits that the vessel is about to leave this port.

Tenth. The claimant admits jurisdiction and denies each and every other allegation of the Tenth article of the libel.

Eleventh. Further answering the libel herein, the claimant alleges that in and by the terms of the bill of lading, under which libelant's goods were shipped, the vessel was bound to deliver such cargo from the ship's deck at the Port of Bordeaux "(Act of God * * * Restraints of Princes and Rulers, * * * howsoever excepted), * * * freight for the said Goods, to be prepaid in full without discount, retained and irrevocably ship and/or cargo lost or not lost * * *." Clearance for the said vessel was applied for on October 4th, 1917, but was refused upon the express grounds that no sailing vessels would be permitted by the United States Government to clear for ports in the War Zone, and that the port of Bordeaux was in the War Zone. The Port of New York is guarded by United States war vessels, and the refusal on the part of the United States Government to clear the said schooner made it unlawful for the said schooner or her owners to attempt to sail, and had she done so the said vessel would have been subject to seizure and her master and owners would have been subject to heavy
9 penalties. Subsequently application was made to the Shipping Board for permission to clear and such permission has been refused.

All and singular the premises are true.

Wherefore, claimant prays that the libel herein may be dismissed, with costs.

ROBINSON LEECH,
Proctor for Claimant.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Robinson Leech, being duly sworn, says: I am the proctor for the claimant herein. I have read the foregoing answer and the same is true to the best of my knowledge, information and belief.

The sources of my knowledge and information are statements made by the claimant and her agents, and papers and documents in my possession.

The reason why I make this verification instead of claimant is that the claimant is not within the City of New York, nor within one hundred miles thereof.

ROBINSON LEECH.

Sworn to before me this 9 day of November, 1917.

RUSSEL R. VAUGHAN,
Notary Public, Kings County, N. Y., No. 40.

Certificate Filed in New York County. Clerk's Office, No. 23, in New York County. Register's Office, No. 9081, and in Kings County Register's Office, No. 9012.

10 *Testimony.*

District Court of the United States, Southern District of New York.

INTERNATIONAL PAPER COMPANY, Libelant,

vs.

THE SCHOONER "GRACIE D. CHAMBERS," Her Tackle, &c., Respondent.

Before Hon. Augustus N. Hand, District Judge.

New York, November 13, 1917.

Appearances:

Messrs. Stetson, Jennings & Russell (Mr. Von Bernuth), Proctors for Libelant.

Robinson Leech, Esq., Proctor for Respondent.

The claims of the libel and answer are stated.

Mr. Von Bernuth: If your Honor please, I move to amend the libel in order to have it state that the freight was not paid on October 1st. Originally the Commercial Forwarding Company drew a draft, which was not correct in amount and which was not honored, and the freight was subsequently paid by certified check, on October 4th.

Motion granted.

(It is admitted that the International Paper Company is a domestic corporation incorporated under the laws of the State of New York and has an office in this city and district.)

11 JOHN R. BROWN, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Von Bernuth:

Q. Mr. Brown, what is your business?
A. Shipmaster.
Q. And you are now master of what vessel?
A. The schooner Gracie D. Chambers.
Q. How long have you been master of that vessel?
A. Since the 10th day of September.
Q. Where was the vessel when you became master of her?
A. She was laying on the Red Hook Flats.

Q. Did she thereafter berth at another pier or dock in the harbor of New York?
A. Yes, sir.
Q. Where?
A. 5th Street, East River.
Q. And how long did she remain there?
A. Seven days.
Q. From what date to what date?
A. From the 27th to the 3rd of October.
Q. From the 27th——
A. Of September.
Q. To the 3rd of October?
A. Yes, sir.
Q. And at that time, on the 3rd of October, had you completed loading or was there something still to be loaded on the vessel?
A. Yes, sir; there was something still to be loaded.
Q. You started loading——
A. We started to load on the 27th of September.
Q. And you completed loading when?
A. The 3rd of October.
Q. Where did the vessel go after that?
A. To Red Hook Flats.
Q. That was for the purpose of saving wharfage pending the issuance of clearance papers?
A. Yes, sir.
Q. During the period that you were at the pier did you receive 352 rolls of news print paper from T. F. Wilmot & Company?
A. Yes, sir.
12 Q. And did you sign bills of lading covering this paper?
A. Yes, sir; I did.
Q. I show you a bill of lading and ask you if that is the original bill of lading you signed covering this shipment?
A. Yes, sir; that is the bill of lading I signed.

(The paper shown the witness is offered in evidence.)
(Received and marked Libelant's Exhibit 1 of this date.)

Q. This bill of lading is dated September 21st—I am referring to Libelant's Exhibit No. 1. Was the paper loaded at that time or thereafter?
A. It was loaded after.
Q. Did you apply for clearance to the port authorities here in New York?
A. Yes, sir.
Q. At the Custom House at Bowling Green?
A. Yes, sir.
Q. When did you apply for clearance?
A. October 5th.
Q. Didn't you apply before that time?
A. I did not; no, sir.
Q. Did you have any conference with the attorney for the claim-

ant here, Florence G. Payne, with reference to the preparation of his answer to the libel which had been brought against the vessel?

A. No, sir.

Q. Now, previous to October 5, 1917, had you heard of any order of the Navy Department or the Export Administrative Board relating to the clearance of sailing vessels for the war zone?

A. Yes, sir.

Q. How long before October 5, 1917, had you heard these remarks concerning the clearance of sailing vessels for the war zone?

A. As near as I can remember, it was about the 3rd of October.

13 Q. Who did you hear the remarks from?

A. I read it in the paper.

Q. You saw it in the paper?

A. Yes, sir.

Q. Did you have occasion to talk to any captains of any sailing vessels or the captains of any vessels in regard to that order?

A. No, sir.

Q. Did you hear a rumor about it on the 4th?

A. No.

Q. The first time that you went to the Custom House was, as you say, on the 5th of October?

A. On the 5th of October; yes, sir.

(No cross-examination.)

Mr. Leech: I move to amend the eleventh paragraph of the answer so as to conform to the proof by changing the date on which clearance was applied for from October 4th to October 5th.

Motion granted.

PHILLIP THIEL, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Von Bernuth:

Q. Mr. Thiel, you are a member of the firm of T. F. Wilmot & Company?

A. Yes, sir.

Q. Located at 24 State Street, New York City?

A. Yes, sir.

Q. And their business is what?

A. Forwarding freight.

Q. Did you act as forwarders for the International Paper Company in connection with 352 rolls of news print paper in September of this year?

A. Yes, sir.

14 Q. On what boat did you ship this paper?

A. I shipped it—I tried to ship it on the Gracie D. Chambers.

Q. I show you Libelant's Exhibit 1 and ask you if that is the bill of lading which you received on that paper?
A. Yes, sir.
Q. Did you personally receive that bill of lading?
A. Yes, sir.
Q. And where were you when you received it?
A. In my office.
Q. At that time did you, pay the freight moneys mentioned in the bill of lading?
A. Yes, sir; when I received the bill of lading.
Q. And who did you pay it to?
A. Mr. Smith.
Q. And Mr. Smith—is he one of the members of the Commercial Forwarding Company?
A. I think so; I didn't know Mr. Smith's connection with the Forwarding Company; I know he was there.
Q. At any rate, did you hand him a check, which I show you, dated October 4, 1917?
A. I gave him that check.
Q. And Mr. Smith is the gentleman sitting at the end of the row next the door?
A. Yes, sir.

(The check shown the witness is offered in evidence.)
(Received and marked Libelant's Exhibit 2 of this date.)

Q. What time of day, if you remember, was it that you received that bill of lading and paid Mr. Smith the check, or handed Mr. Smith the check, on October 4, 1917?
A. Between 2 and 3 o'clock.
Q. Has your firm been reimbursed by the International Paper Company for the amount that you spent at that time?
A. Since then we have; yes.
Q. And throughout the whole proceeding you were acting only for the International Paper Company?
A. Yes, sir.

Cross-examined.

By Mr. Leech:

Q. Do you know who made out, filled in, this bill of lading, this blank form?
A. We did.
Q. In your office?
A. Yes, sir.
Q. And you put the date on there, September 21st?
A. Yes, sir.
Q. The goods were really delivered some days later?
A. Not through any fault of ours.
Q. But they were delivered some days later?
A. Yes.

Q. And do you know what date they were delivered, the goods?
A. I really don't remember.

Redirect examination.

By Mr. Von Bernuth:

Q. Who furnished you the form on which this Libelant's Exhibit 1 is made out?
A. Mr. Smith.
Q. When did you first know that the order had been issued?
A. About the 1st of October.
Q. You heard rumors of it?
A. Rumors; yes.
Q. When did you definitely know that such an order had been made by the Navy Department and the Export Administrative Board?
A. Not until I heard of this case; that was the first I knew of it.
Q. When was that? After the delivery of this check?
A. Yes. As a matter of fact, I asked Mr. Smith if this vessel had—if there was any doubt of this vessel going, and he said no, she was surely going and would make the voyage.

Mr. Von Bernuth: I offer in evidence copy of a telegram dated September 28, 1917, signed by Rowe, which I understand and
16 I think it will be conceded was received by the Collector of the Port of New York on the morning of September 29, 1917, and was put into effect by the Collector on that date.

Mr. Leech: That is right, isn't it?

Mr. Lott (who is in the court room): Yes

Mr. Leech: And from and after the time of the receipt of this telegram no further clearance was given to any sailing vessel destined for the war zone by the Collector of the Port of New York or has been since.

The telegram referred to is as follows:

"Washington, D. C., 4.25 p. m.,

September 28, 1917.

Collector of Customs, New York, N. Y.:

Withhold clearance any sailing vessel if any part of her voyage would bring her within danger zone. Advise shippers when presenting licenses with export declarations that the license will be inoperative if goods are to be shipped on such sailing vessel and that application to make shipments on such vessels must be made to Bureau Export Licenses.

ROWE.

Received at the New York office of the Telegraph Company at 4.54 P. M."

(It is stipulated that Mr. Rowe is Assistant Secretary of the Treasury, Washington, D. C.)

Mr. Leech: I would like to state that upon the receipt of that order all clearances to sailing vessels were refused when they
17 were applied for when they were destined to any part of the war zone. Is that correct (to Mr. Lott).

Mr. Lott: We followed the telegram and withheld clearances and instructed them, as the telegram says, to apply to the War Board. I understand there was a foreign—I am not sure—I think there was one Portuguese sailing vessel that the department permitted to clear, but that was not an exception to this rule. This ruling instructed the Collector not to grant clearance unless permission was granted by 11 Broadway, and the Collector has not granted the clearance since.

(11 Broadway is the War Trade Board for Licenses.)

Mr. Leech: Have any permits been granted, as far as you know?

Mr. Lott: As I say, I think there was a Portuguese steamer; I am not sure of that.

Mr. Leech: No American one?

Mr. Lott: None that we know of.

Mr. Leech: And you have granted no clearances to American vessels since, for ports in the war zone?

Mr. Lott: No.

(It is stipulated that these are the facts as far as Mr. Lott knows them.)

18 JOHN R. BROWN recalled.

By Mr. Von Bernuth:

Q. Mr. Brown, before October 4, 1917, did you know of sailing vessels that had attempted to leave the harbor of New York and had been brought back by torpedo boat destroyers or other United States Government vessels?

A. No, sir; I had not.

Q. Had you heard of it?

A. No.

Q. You didn't know that vessels had been brought back?

A. No.

Mr. Von Bernuth: I offer in evidence—I subpœnaed it and it has not got here yet—a copy of the answer of the Commercial Forwarding Company, who appear as agents for the owner.

Mr. Von Bernuth: I want to offer paragraph eighth of this answer in evidence. It is taken from the answer of Anthony Crawford and C. Lorenzo Smith, claimants of the schooner Gracie D. Chambers, her tackle, &c., to a libel in the United States District Court for the Eastern District of New York, which was filed, acting for the owners of the vessel, as I understand it. I am reading from paragraph eighth of the answer: "Upon information and belief, on or about September 29, 1917, the United States Shipping Board, being vested with and

acting in accordance with authority conferred by Congress of the United States, proclaimed an embargo preventing the departure of all sailing vessels from United States ports for ports in and about the war zone. On or about October 1, 1917, and while the schooner Gracie D. Chambers was lying in the Port of New York and
19 before the completion of the loading of the cargo on said vessel, the claimants were informed of said proclamation and embargo. Steps were at once taken to make an attempt to clear the vessel for the Port of Bordeaux, but the Customs House refused to issue clearances."

That is all of the paragraph that I desire to offer in evidence. The answer was filed by Robinson Leech, proctor for the claimant, who is the proctor for the claimant in this proceeding.

(It is conceded by the proctor for the claimant in this case that the answer made, of which a paragraph has just been read in evidence, was verified by C. Lorenzo Smith and Anthony Crawford. In that case Judge Veeder dismissed the libel.)

Libelant rests.

Case for Claimants.

WILLIAM R. LOTT, being duly sworn and examined as a witness for the claimants, testifies:

Direct examination.

By Mr. Leech:

Q. Mr. Lott, are you officially connected with the United States Custom House?

A. Yes, sir; Acting Deputy Collector.

Q. And you appeared here in response to a subpœna today with certain original telegrams regarding the orders to withhold clearance to sailing vessels bound for the war zone?

A. I did.

20 Q. Other than any articles which may have appeared in the newspapers, was any official announcement given by your office of the issuance of this order?

A. To the public?

Q. Yes; to the public.

A. Only as each vessel applied for clearance.

Q. No public announcement was made stating that all clearances would be withheld and no one was advised of that fact until they applied for clearance; is that correct?

A. That is correct.

Q. So far as you know, was any official announcement made by any other branch of the Government?

A. I don't know.

Q. You don't know of any such announcement, do you, personally?

A. I only read it in the papers.

Q. And what you read in the papers were simply newspaper stories that such and such embargo had been placed on sailing vessels, or to that effect; is that right?

A. I had no knowledge of it; I had no official knowledge of it.

Q. What was it that you read in the newspapers, was it simply a newspaper story or an official proclamation or advertisement issued by the Government?

A. It simply stated that the Government had barred, at the request of the Navy Department and the Board of War Risk Insurance, these vessels from going to the war zone.

Q. What I am getting at, Mr. Lott, were these articles in the newspaper official articles; did they bear the stamp of official articles published by the Government, or were they simply newspaper stories?

A. I would call them newspaper stories.

Q. What was the earliest that you remember having seen definite statements in the newspapers that the clearance had been withheld?

A. We have one in the office that I think is dated the 10th.

Q. What month?

A. October.

21 By the Court:

Q. When was the first public announcement that the clearances had been refused, so far as you know?

A. That was the first, so far as I know.

(No cross-examination.)

JOHN R. BROWN, recalled for the claimants.

By Mr. Leech:

Q. What was the date, Captain Brown, when the loading of the Wilmot paper commenced?

A. The 27th of September.

Q. And when was it completed?

A. The 29th.

Q. Of September?

A. Yes, sir.

Q. When did you sign the bill of lading covering that shipment?

A. I wouldn't like to say that; I can't remember.

Q. Was it about, approximately, the time the loading was completed?

Objected to as leading.

Q. The loading had been completed on the 29th of September; is that right?

A. That is right.

Q. And did the goods remain on board the vessel after that date?

A. Yes, sir.

Q. Do you know when they were discharged, if ever?

A. We started to unload on or about the 17th of October.

Q. In the meantime they remained in the vessel?

A. Yes, sir.

22 ANTHONY CRAWFORD, being duly sworn and examined as a witness for the claimants, testifies:

Direct examination.

By Mr. Leech:

Q. Are you a member of the firm known as the Commercial Forwarding Company?
A. Yes, sir.
Q. And is Mr. Smith your partner?
A. Yes, sir.
Q. What connection have you and Mr. Smith with the vessel Gracie D. Chambers?
A. We are purchasers and agents.
Q. And from whom were you purchasing the vessel?
A. From Florence G. Payne, connected with the Boston brokerage people.
Q. Have you completely paid for that vessel yet?
A. Not as yet; no.
Q. Have you paid any amount?
A. We have; yes.
Q. Under the terms of your contract with Miss Payne did any of those payments have to do with this particular freight?

Mr. Von Bernuth: Referring to the contract between the claimant in this proceeding and the Commercial Forwarding Company, it is a matter of record, and I think we should be protected. I think the record here ought to show as an indication of the rights of the contract between the parties.

Q. I show you a paper dated the 22nd day of August, 1917, and ask you if that is a duplicate original of the contract for the sale and purchase of the schooner Gracie D. Chambers?
A. It is.
Q. And is that the paper signed by you and Mr. Smith?
A. Yes; it is.

(It is stipulated that a copy of it may be marked in evi-
23 dence subject to comparison and correction with the original, Claimant's Exhibit A.)

Q. When was the bill of lading for this particular shipment presented, if you know?
A. It was given to the Franklin Trust Company on September 29th.
Q. Attached to anything?
A. Yes; with a sight draft attached to it.
Q. And that draft was honored or not honored?
A. It was not honored.
Q. And why not?
A. That we don't know; the Franklin Trust people said they sent

someone there once or twice and could not find anybody in; that was what we were told.

Q. Was the amount of freight afterwards changed?

A. Yes; it was changed when Mr. Thiel called us up and asked us to change it.

Q. So eventually this freight was paid in what way?

A. It was paid to Mr. Smith by Mr. Thiel, after Mr. Thiel called us on the telephone and asked us to change the amount.

Q. And do you remember what day that was?

A. Well, it was a day or two after the bank had taken the matter up with him. I think it was Monday or Tuesday.

Q. If the date of the check was October 4th, you wouldn't dispute that it might be October 4th, would you?

A. No; it wasn't October 4th, for he asked us to change the bill of lading and send it the following morning to be collected.

Q. Now, at any time before this freight was paid, had you attempted to clear the vessel at the Customs House, and had such clearance been refused?

A. No; I didn't.

Q. But had anyone else, to your knowledge?

A. That I don't know; not with my authority, anyway.

24 Q. Had you any knowledge of the fact that this vessel would not be permitted to sail?

A. No; certainly not——

Q. Before the freight was paid?

A. No; certainly not.

Objected to as to form and as leading.

The Court: Let him state what knowledge he had. The answer is stricken out.

Q. What knowledge, if any, did you have with regard to the fact that the Gracie D. Chambers would not be allowed to sail for the war zone?

A. None at all until the Custom House broker reported to us that they wouldn't allow her to sail; that is all.

Q. And do you know if anything was done after that report was made to endeavor to let the schooner Gracie D. Chambers to sea?

A. Yes.

Q. What?

A. We took the matter up with the Shipping Board through you.

Q. And did you take it up with anyone else at 11 Broadway?

A. Yes; our captain did, and so did the Custom House broker.

Q. Did you find out definitely and immediately that the vessel could not sail?

A. We didn't find out definitely until the 9th or the 10th of the month.

Cross-examined.

By Mr. Von Bernuth:

Q. Have you got the draft that you sent to the Franklin Trust Company, which was drawn against T. F. Wilmot & Co.?

A. No; I haven't got it.

Q. If I show you this piece of paper, will that refresh your recollection as to the amount of the draft that you originally sent to the Franklin Trust Company?

A. It was in the neighborhood of $6,000.

25 Q. Does that refresh your recollection any more?

A. Yes; it was in that neighborhood somewhere.

Q. And that was more than the freight money that was paid by you to T. F. Wilmot & Company?

A. Yes.

Q. And you had a dispute with Mr. Thiel, of T. F. Wilmot & Company, as to the amount due for freight on account of the paper that had been placed on the boat?

A. Yes.

Q. And Mr. Thiel said the amount of sixty-six-odd hundred dollars was too much?

A. Yes.

Q. And the matter was subsequently adjusted on October 4th, was it not?

A. Yes.

Q. And you came into Mr. Thiel's office on the afternoon of October 4th with the bills of lading and received the check and presented it to the Franklin Trust Company, did you not?

A. I did not, but my partner did.

Q. On that day?

A. Yes.

Q. And that check is Libelant's Exhibit 2, which I show you here; is that right?

A. I guess that is right; yes, sir.

Mr. Von Bernuth: I offer in evidence a notification from the Franklin Trust Company that a draft of $6663.29 drawn by the Commercial Forwarding Company was being held by them, and a notice addressed by them to T. F. Wilmot & Company, 33 State Street.

(Received and marked Libelant's Exhibit 3 of this date.)

Q. Now, Mr. Crawford, you were one of the claimants in the proceeding brought in the United States District Court for the Eastern District of New York, were you not?

A. Against that same vessel.

Q. And in the course of that proceeding you had occasion

26 to verify an answer to the libel in that case?

A. Yes.

Q. Where did you verify that answer?

COPY BOUND CLOSE

A. Where did I do that?
Q. Yes.
A. At Mr. Leech's office.
Q. 27 Cedar Street, New York?
A. 27 Cedar Street; yes.
Q. And before Mr. Leech presented this answer to you for signature did you give him any information concerning the facts in the case?
A. I don't know that I did.
Q. Had you had any conference with Mr. Leech about them?
A. Yes.
Q. Was that in person or by telepohne?
A. By telephone.
Q. And it was after you had the telephone conversations with Mr. Leech that you went down to his office and verified the answer to the libel in the case in the Eastern District?
A. Yes, sir.
Q. Did your partner go down with you, Mr. Smith?
A. I don't think so, for my partner left the office; I am not sure now.
Q. And you came down to Mr. Leech's office?
A. Yes.
Q. And you signed the paper?
A. I did; yes, sir.
Q. And did you tell Mr. Leech the facts correctly as you understood them?
A. Well, at that time I don't believe Mr. Leech was in his office, for it was late.
Q. You had a telephone conversation with Mr. Leech before you went to his office?
A. Yes.
Q. And did you tell Mr. Leech the facts as correctly as you understood them?
A. Yes.
Q. And before you signed this answer did you read over the answer?
A. No; I didn't see any use of reading it.
27 Q. You told Mr. Leech the facts as you understood them and you came down and signed that answer and swore to it?
A. I relied on Mr. Leech.

Mr. Leech: I saw some article in the paper that some notice had been or was to be issued.
Mr. Von Bernuth: Do you concede that the answer of Mr. Crawford and Mr. Smith contained paragraph eight that was read in evidence?
Mr. Leech: Yes.

Q. And that is the answer that you signed when you went to Mr. Leech's office?
A. What is that?

IN CENTER

Q. (It is shown the witness.)
A. I won't say that; I didn't read it.

Mr. Leech: I admit it.

CHARLES LORENZO SMITH, being duly sworn and examined as a witness for the claimants, testifies:

Direct examination.

By Mr. Leech:

Q. You are a partner of Mr. Crawford's and a member of the firm the Commercial Forwarding Company?
A. I am; sir.
Q. And you are one of the two gentlemen who signed the contract for the purchase of the schooner Gracie D. Chambers?
A. Yes, sir.
Q. Do you remember the draft for the collection of the freight on the schooner Gracie D. Chambers under the bill of lading in this suit?
A. Yes, sir.
Q. And do you remember what day it was that you prepared that draft?
A. On Saturday, the 29th of September.
28 Q. Did you attach to it copies of the bill of lading?
A. I attached copies of the bill of lading and took them over to the Franklin Trust Company.
Q. That was your bank?
A. That is my bank; yes.
Q. And that time had you had any knowledge or heard——

Objected to.

Q. At that time what knowledge had you of this order from the United States Government?
A. I had no definite knowledge; I only read in the newspapers that an embargo was about to be placed, but I had no definite knowledge; I simply read it in the newspapers.
Q. After you had presented this draft, was the draft honored?
A. No, sir; Mr. Thiel telephoned me on the following Monday, and he made me acquainted with the fact that I had promised him in the event of our taking paper from any other firm for a price less than the one that we had agreed upon that we would be willing to give him the same privilege or allow his paper to be carried forward at the same price. And I told him, of course, it was not a written agreement, for we held his letter, but I told him I was perfectly willing to concede it.
Q. The matter was finally adjusted, was it?
A. It was; yes, sir.
Q. At a lower rate?
A. At a lower rate. That was the rate we had agreed on.

COPY BOUND CLOSE

Q. And you accepted money in payment of the freight due under that bill of lading?

A. I did, sir.

Q. Had you any further knowledge with regard to this embargo at the time the freight was actually paid?

A. Before Mr. Thiel paid me the check he asked me if I felt the ship would go forward. I told him I had every reason to believe so.

29 Q. And at that time had you applied for clearance?

A. No, sir; I did not apply—at least, I instructed Captain Brown on Friday, the 5th of the month.

Q. To apply for it?

A. Yes; because——

Q. Did you yourself do anything about trying to get clearance for the vessel?

A. No, sir.

Q. But on the next day did you?

A. No, sir.

Q. Did you go to 11 Broadway——

A. We have a regular broker. No, sir; I didn't go to 11 Broadway.

Q. When was it that you finally found out definitely that this vessel would not be permitted to sail?

A. It was around the 10th or 11th of October; I am not quite sure about the date. I wouldn't be very positive about that, but it was somewhere around that.

Cross-examined.

By Mr. Von Bernuth:

Q. Did you personally prepare the draft that was sent the Franklin Trust Company to be presented to T. F. Wilmot & Company?

A. I did, sir.

Q. And was that draft presented or attempted to be collected by the Franklin Trust Company more than once?

A. That I can't say. Of course, the Franklin Trust Company—I don't know how often they presented it, but I do know I took the draft down with the bills of lading attached, on Saturday, to be collected.

Q. And isn't it a fact that the draft was dated October 1st and was to be presented to T. F. Wilmot & Company or held for their taking it up on October 1st; that was Monday?

A. No, sir; I don't remember that; I remember distinctly when I took it to the office it was to be collected on Saturday, the 29th of September.

30 Q. Now, I show you Libelant's Exhibit 3 and ask you whether that refreshes your recollection?

A. What is that?

Q. It is a notification from the Franklin Trust Company to T. F. Wilmot & Company that a sight draft for $6,600 and odd was held for them?

A. I don't know anything about the date.

E IN CENTER

Q. Was the original draft for $6,663.29?

A. It was around there; it was in that vicinity, anyway.

Q. I show you the original bill of lading, Libelant's Exhibit No. 1, and that amount of $6,663.29 appears on the face of the bill of lading stricken out?

A. Yes; that is right.

Q. Now, it was after you agreed with Mr. Thiel, of T. F. Wilmot & Company, that the amount of $5,845 was placed on the bill of lading above the letters which had been stricken out?

A. Yes.

Q. And was that amended amount of $5,845 agreed upon on the day that you received Messrs. Wilmot & Company's check?

A. No; it was not agreed upon on the telephone; I am not quite sure it was the same day; I think it was the day before.

Q. That is the 3rd of October?

A. Yes; the 2nd or 3rd of October; I wouldn't be very positive about that date.

Q. Anyway, it was shortly before October 4th?

A. Yes; shortly before.

Q. And your best recollection is that it was probably October 3rd?

A. Yes; it is very possible.

Q. You said you read an article in the newspaper about this order of the Export Administrative Board on the 4th of October?

A. No; I am not quite positive as to the date, but I do remember having read something with reference to it.

Q. The vessel, as I understand it from Captain Brown, had completed loading on the 2nd of October, 1917?

31 A. Captain Brown is more acquainted with that fact because the boat laid some distance away from the office, and it wasn't very convenient for us——

Q. But didn't Captain Brown keep you in touch with the loading of the boat from day to day?

A. Not from day to day.

Q. Didn't you tell Captain Brown, and wasn't it in the regular course of business for him, to report to you the completion of the loading of the boat?

A. Oh, yes; he had to do that.

Q. And, of course, the idea was as soon as the boat was loaded to get her off as soon as you could and to save money on the boat; isn't that right?

A. Well, possibly right.

Q. That is a fact, isn't it? You weren't going to allow the boat to lie idle for two or three days until the captain reported it to you?

A. Oh, no.

Q. And as soon as he completed the loading he was to report it to you?

A. Certainly.

Q. And he either notified you as soon as the boat was completed, or on October 3rd, that they had completed the loading?

A. Oh, yes.

COPY BOUND CLOSE I

Q. Was the matter of application for clearance subject to your orders?

A. Yes.

Q. What I mean is, the captain wouldn't apply for clearance until you told him so?

A. No, sir; that is, Mr. Crawford or myself.

Q. Well, I mean either you or Mr. Crawford?

A. Certainly.

Q. And do you now say that you did not instruct the captain to apply for clearance before October 5th?

A. Not before October 5th, sir.

Q. And why did you wait from October 2nd or early on October 3rd to October 5th before you instructed the captain to apply for clearance on the vessel?

A. Because we hadn't had Mr. Thiel's prepaid freight.

32 Q. So you were waiting for Mr. Thiel to pay his money?

A. Yes, sir.

Q. There was other freight on board this boat for which you hadn't been paid, wasn't there?

A. Yes, sir.

Q. There is freight on sixty-two tons of paper, another shipment, for which you haven't been paid, isn't there?

A. Yes, sir.

Q. And you had completed the loading of the vessel and were waiting for payment of freight ?

A. Yes, sir.

Q. Then why didn't you wait until October 5th?

A. Because it was our intention to have the vessel go under any circumstances and have our lawyer take the matter up.

Q. Do you know who Messrs. T. F. Wilmot & Company represented on that shipment?

A. Not particularly; I only did business with Mr. Thiel.

Q. Yes; I know that, but did you know that Messrs. T. F. Wilmot represented the International Paper Company?

A. No; I didn't know that, not until after.

Q. Well, did you see the shipment put on board?

A. The captains see all about that.

Mr. Leech: How is that material?

The Witness: The freight is taken on board by the captain; he sees about that.

Q. Did you see the shipment put on board involved in this libel?

A. No; as I told you before, I wasn't at the ship all the time.

Q. Did you see any paper put on board?

A. I saw some paper put on board.

Q. Did you notice that the name of the International Paper Company was on the paper?

A. That I didn't notice; no.

33 Q. Well, now, can you tell me again why you didn't apply for clearance until October 5th?

IN CENTER

A. As I told you before, we were trying to collect our freight, the prepaid freight.

Q. Did you know who Beisel & Company represented?

A. Mr. Burr came in and told me; in fact, Mr. Burr signed the—let me see—we did business with Mr. Burr through Beisel & Company.

Q. You know, of course, that Messrs. Wilmot & Company were not acting for their own account but were acting for principals, didn't you?

A. No; that I can't say; I did business with Mr. Wilmot.

Q. But you knew they were acting as forwarders or brokers on the shipment?

A. No; I am not prepared to say that, because I had a letter from Mr. Wilmot, and which I returned to him, and in which he promised to pay this money to the Franklin Trust Company, so I was doing business with Mr. Wilmot in its entirety; that is the way I took it.

Q. You also signed the answer to the libel in the action in the United States District Court for the Eastern District of New York brought by C. B. Richard & Company?

A. Yes.

Q. And did you have any conversation with Mr. Leech before Mr. Leech prepared that answer and you signed it?

A. I think Mr. Crawfard did it; I happened to be out of the office when Mr. Crawford got in touch with Mr. Leech, for I remember that Mr. Crawford told me Mr. Leech rang up about the matter.

Q. You remember going down to the office and signing that answer, don't you?

A. Yes.

Q. Do you remember having any conversations with Mr. Leech over the telephone or in person before you signed that answer?

A. I don't remember that.

Q. Was Mr. Leech in his office when you went to the office to sign it?

A. Yes, he was there.

34 Q. Did he go over the matter with you?

A. No, I don't think he did, inasmuch as I know my partner had signed——

Q. You didn't read the answer?

A. No, sir.

Q. You just signed and swore to it without reading it over?

A. Yes.

Q. You knew you were swearing to something?

A. Oh, yes, that is so.

Redirect examination.

By Mr. Leech.

Q. Where did you get this knowledge that you are charged with having put in writing about the proclamation and embargo on October 1st?

COPY BOUND CLOSE

A. As far as I can recall, I read something in the paper referring to it, some paper, in which I read something about it.

Q. Do you remember my speaking to you about it on October 1st, about, and saying to you that you should make every effort to get the vessel clear?

A. I don't remember that particularly.

Q. Is it or is it not a fact that the vessel had taken all her cargo on board before the application for clearance was made?

A. She had taken on all the cargo.

Q. Had she taken all the cargo that had been contracted for?

A. Oh, no.

Objected to as irrelevant in this case, and motion to strike it out. Motion denied. Exception.

Q. Was that cargo which had been contracted for and had not been loaded, was that ever delivered to the vessel?

Mr. Von Bernuth: Objected to; the vessel had not applied for clearance.

Mr. Leech: It is offered to show that they didn't unduly
35 delay this application for clearance, that they hadn't completed loading.

Allowed. Exception.

A. No.

Recross-examination.

By Mr. Von Bernuth:

Q. When you read this article in the newspaper about this proposed order, or an order which had been put into effect, you knew that if it was carried through, your vessel couldn't leave for France, didn't you?

A. No, I wouldn't accept it that way.

Q. You don't remember, then, when you had a conversation with Mr. Leech about that?

A. I don't remember.

Q. You haven't got any recollection now as to what was in that newspaper article or what conversation you had with Mr. Leech about that order, have you?

A. As far as I remember, it was published in the Tribune; I generally read the Tribune, and as I remember, it was to the effect that a ban would be placed on sailing vessels.

Q. You knew that if a ban was placed, your vessel couldn't sail?

A. No, I couldn't say that for certain.

Q. Now, answer my question, Mr. Smith, please. You knew at the time you read this article that if a ban was placed or had been placed on sailing vessels destined for the war zone, that your vessel couldn't clear, didn't you?

A. Just put the question again.

IN CENTER

Q. I say that you knew when you read that newspaper article, from your experience in the shipping business, that if that order was put in effect or was already in effect, your vessel would not be able to clear for the war zone?

A. Your question is not what I read in the paper.

36 Q. Just listen to me once more. You read this article and it referred to an order which was in effect, or was proposed to be put into effect, preventing sailing vessels from clearing for the war zone; is that right, am I right or am I wrong?

A. No, I don't think you are putting the question in a way I can answer it.

Q. You just said you read an article in the newspaper about a ban being put on vessels sailing for the war zone.

A. I said it was a rumor.

Q. Well, you knew from your experience in shipping that if that ban was put into effect the Gracie D. Chambers would not be allowed to clear for France?

A. No, sir, I didn't know it.

Q. How much experience have you had in shipping?

A. Very little, I can tell you that unhesitatingly.

Q. How long have you been working in the shipping business?

A. I have been in the shipping business for six or seven months.

Q. Six or seven months?

A. Yes, sir.

Q. So you have been engaged in loading and clearing vessels and selling freight space on them six or seven months before this happened?

A. No, seeing about the other matters. You take, for instance, in the loading, I tell Captain Brown about the loading and he would see to it, and I saw Mr. Thiel and make the arrangements as to the price. Those questions I can answer you outright.

Q. And Mr. Crawford is the partner who handled all the matters of loading and clearing, is that right?

A. He is more in that line than I am.

Q. Why wasn't any more cargo put on the vessel, if you know, than she actually had on when clearance was applied for?

A. We couldn't get the cargo.

Q. You couldn't get the cargo?

A. No; the shippers figured it was held some place up-State.

37 Q. Do you know when you received notice to that effect?

A. I don't remember the date particularly.

ANTHONY CRAWFORD, recalled.

By Mr. Leech:

Q. Do you remember that there was some cargo that had not been placed on board the vessel, which had been contracted for, and Mr. Smith has just testified about?

A. Certainly.

Q. Are you familiar with the handling of that cargo?

COPY BOUND CLOSE

A. I am.
Q. Who were the shippers of that cargo?
A. C. H. Cunleigh & Company.
Q. And what did it consist of?
A. Wire.
Q. Was that cargo ever delivered to the vessel?
A. Part of it.
Q. Not all of it?
A. No, not all of it.
Q. Can you give the reason why this vessel had not cleared and sailed before October 1st?
A. Well, we were really waiting for that sixty-six tons of wire.
Q. Was all the loading except for this sixty-six tons completed by September 29th?
A. Well, yes.
Q. Now, will you tell the Court why it was that you applied for clearance without waiting for the balance of the sixty-six tons of wire?
A. You advised me to do that because you heard of some rumor that a ban would be placed on sailing vessels.
Q. And tell the Court as nearly as you can remember what it was that I said with regard to the rumor which I had heard.
38 A. Well, I don't know that. You said something about we wouldn't come under that heading, as we had started loading this vessel ever since September 24th—I mean August 24th. You said if the rumor went into effect it wouldn't be before October 15th.
Q. Do you remember yourself seeing such a statement in the paper?
A. No, I wouldn't remember.
Q. Your only recollection is what I told you?
A. Yes, I think you said you saw it in the paper, that it would be in effect October 15th.
Q. And did I connect that with any reason for your making your application for clearance at once without waiting for this sixty-six tons of wire?
A. Yes, you said to make it before October 15th. They wouldn't put it in effect before they would give the shipowners a chance to clear the vessels.

Cross-examination.

By Mr. Von Bernuth:

Q. Did you have any conversation with your partner, Mr. Smith, about having read this article in the Tribune?
A. No, I don't think so.
Q. You had a conversation, however, with your attorney before October 5th, didn't you, about the clearance of this vessel?
A. Oh, yes.
Q. And when you state the attorney said the ban would go into

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effect on October 15th you are merely stating what your attorney said?

A. Yes.

Q. Had you made any investigation at the Custom House about the order or whether it had gone into effect?

A. No, I had not.

Q. You were the man in the Commercial Forwarding Company whose business it was to keep in touch with all the matters of clearing the vessel?

A. Yes.

Q. You were doing the outside work, so to speak?

A. Yes.

39 Q. And it was your duty to go about and keep in touch with the shipping situation and the matter of getting vessels in and out of the port?

A. Yes.

Q. And you knew about this rumor before October 5th and when the clearance was applied for?

A. Well, yes.

Q. How long before that time did you know it?

A. I couldn't tell you.

Q. Could you tell me whether it was a day or two days?

A. I don't know, and if I had known it I wouldn't have believed it, for 99 per cent. of the rumors in the shipping business are lies.

Q. This was a rumor that vitally affected this ship, wasn't it?

A. Yes.

Q. And you knew that if the rumor went into effect the vessel would be refused clearance for her port?

A. Yes; and the shippers didn't believe it.

Q. And you knew it was a rumor that would seriously affect your rights in the situation?

A. No, sir.

Q. Did you make any effort to run down this rumor?

A. No, I did not, because I didn't believe it.

Q. Wasn't there also some paper belonging to the International Paper Company which had been contracted for with the vessel through W. Beisel & Company?

A. We contracted with Beisel, yes.

Q. And you didn't put all the paper on board that was contracted for on that shipment, did you?

A. No, we couldn't.

Q. Why do you say you couldn't?

A. We didn't have room enough for it.

Q. Then the vessel was loaded as far as she could be loaded when you applied for clearance?

A. No, sir, that vessel could take five rolls of wire to half a roll of paper, so where we couldn't put paper we put wire.

40 Q. Wire is heavy merchandise?

A. Yes, sir. We need wire when we carry paper.

Q. The wire is heavier than the paper, isn't it?

A. Yes, sir.

COPY BOUND CLOSE

Q. And isn't it customary in stowing cargo to put the heavy cargo down in the hold?

A. Well, sometimes, yes.

Q. Well, isn't it customary to put the heavy cargo down low so as not to make the boat tender?

A. Yes, but we put the other where we could not put the paper.

Q. You were putting wire in the places where the paper did not cover?

A. Yes.

Q. Did you have anything else?

A. Yes, sir, oil.

Q. How much?

A. 731 barrels of oil.

Q. And the barrels of oil will approximately take up the same amount of space as a roll of paper—it is a little different shape, but approximately the same space?

A. Yes, but the Beisel paper is smaller.

Q. The Wilmot paper is a roll about five feet long and about a foot and a half to two feet wide?

A. Yes, about that, yes.

Q. It is cylindrical in shape?

A. Yes, sir; larger than a barrel.

Q. Did you intend to load any wire on top of the barrels of oil?

A. No, sir, on the sides of the ship.

Q. You were just going to fill in the interstices in the cargo with the wire?

A. Yes, sir, space where paper couldn't go into.

Q. And with the exception of the places where you could get a roll of wire the loading of the ship was complete?

A. Yes, sir.

Q. Do you know where the cargo was destined for?

A. To Bordeaux.

41 Q. And was it destined for the French Government, do you know?

A. No, I don't think so, the consignee was not the French Government.

Redirect examination.

By Mr. Leech:

Q. With reference to Mr. Von Bernuth's question as to whether you made any efforts to clear the vessel before the 5th, isn't it a fact that you did make an inquiry at the Custom House as to whether or not you could clear?

A. No, I think not; I didn't do it personally; we had one of our helpers do it.

Q. Do you know what report was made on that?

Mr. Von Bernuth: Objected to, and motion to strike out the answer unless the man is produced who made the inquiry.

IN CENTER

Recross-examination.

By Mr. Von Bernuth:

Q. But you did send a man to the Custom House before October 5th?

A. Yes, before October 5th.

Q. Can you tell whether it was on October 3rd or 4th?

A. No, I didn't say I sent a man there; I say a man went there on his own accord.

Q. From your office?

A. Yes.

Q. And you don't know whether it was October 3rd or 4th?

A. No, I am sure it was before that.

Q. Before October 3rd?

A. Oh, yes, long before that; it was a Saturday.

Q. Did this man come back and tell you what he had been told?

A. No, I say he said——

Q. Did he come back and tell you what he had been told?

A. No.

Q. He was in your office?

A. Not that day.

Q. He came the next day?

A. Yes.

42 Mr. Leech: I would like to make a statement about this, your Honor; I think I can straighten it out very briefly. On the 1st of October, which was Monday, Mr. Crawford and Mr. Smith were in my office in connection with the payments to be made on the purchase price of this vessel, I representing at that time the old owners, the vendors. I had read that morning in the paper an article which stated that it was reported from Washington that sailing vessels would not be allowed to clear for the war zone after October 15th, and I called that notice to the attention of Mr. Crawford and Mr. Smith, telling them that it would be advisable to get the boat away as quickly as possible. I knew at the time that she hadn't quite completed loading. About Tuesday or Wednesday of that week there were statements in the newspapers that the embargo had been put in effect, and I called up or spoke to Mr. Crawford and Mr. Smith, advising them to at once proceed to try to clear that vessel. I told them that I believed as the vessel had been loaded some time prior thereto that she would undoubtedly be allowed to sail; I didn't believe the Government would absolutely prohibit her sailing if the facts were stated. I myself subsequently to the 5th of October wrote a letter to the Shipping Board at Washington, to whom we had been referred by the Export License Bureau at 11 Broadway, and received a reply on the 10th or 11th of October, stating that no exceptions would be made in the case of the schooner Gracie D. Chambers and one other case which I wrote about. That is the sum and sub-
43 stance of the information that I know we had before application for clearance was made and before the date of the payment of this freight.

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(It is conceded that the Tuesday and Wednesday referred to are October 2nd and 3rd.)

Claimant rests.
Both sides rest.

LIBELANT'S EXHIBIT 1.

Not Accountable for Weights, Marks, Decay, Breakage, or Damage by Rats.

Commercial Forwarding Company.

Ship-owners and Freight Forwarders,
31 Broadway, New York.

Telephone Rector 7472.

L. F.

118 c. m.

Bordeaux.

#914/1537 Various.

Original.

Freight 261,861 lbs. at $50.00 c. m..... $5,845.00.

Total ..... $5,845.00.

Freight Prepaid.

It is also mutually agreed, that this shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to the Navigation of Vessels, etc."

44 Shipped in apparent good order and condition by T. F. Wilmot & Co. in and upon the Schooner called "Gracie D. Chambers" whereof is Master for this present voyage —— —— or whoever else may go as Master in the said Vessel, and now lying in the port of New York, and bound for Bordeaux.

Three hundred fifty-two (352) Rolls News Printing Paper being marked and numbered as in the margin; and are to be delivered from the Ship's deck, where the Ship's responsibility shall cease, in like good order and condition, at the aforesaid port of Bordeaux (the act of God, the King's Enemies, Pirates, Robbers, Thieves, Vermin, Barratry of Masters or Mariners, Restraints of Princes and Rulers, Loss or Damage arising from insufficiency in strength of Packages

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from Sweating, Leakage, Breakage, or from Stowage or contact with other goods, or from any of the following perils, whether arising from negligence, default, or error in judgment of the Master, Mariners or other of the crew, or otherwise howsoever excepted), namely: Risk of craft, Explosion or Fire at sea, in Craft or on Shore, or from the consequence of any damage or injury thereto howsoever such damage or injury may be caused, Collision, Stranding, or other perils of the Seas, Rivers, or Navigation, of whatever kind or nature soever; and howsoever such Collision, Stranding, or other peril may be caused, with liberty, in the event of the vessel coming back to New York, or into any other port, or otherwise being prevented, from any cause, from proceeding in the ordinary course of her voyage, to tranship the Goods by any other vessel, and with liberty during the voyage to call at any port or ports, to receive Fuel, to load or
45 charge Cargo, or for any purpose whatever, to sail with or without pilots, and to tow and assist vessels in all situations, unto Order, Notify La France, Porte Rue Dyeaux Assigns, Freight for the said goods, to be prepaid in full without discount, retained and irrevocably ship and, or cargo lost or not lost at the rate of — gross weight delivered. In witness whereof, the Master or Agents of the said ship hath affirmed to three Bills of Lading, besides Captain's copy all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Weights, Measures, Contents, Quality, Brand and Value unknown. The goods to be taken from alongside by the Consignee, immediately the Vessel is ready to discharge, or otherwise they may be landed and warehoused at his risk and expense. The Collector of the Port is hereby authorized to grant a general order for discharge, immediately after the entry of the Ship. The master Porterage of the delivery of the cargo to be done by the Consignee of the Ship, and the expense thereof to be paid by the receivers of cargo. The owner of the Ship will not be responsible for Money, Documents, Gold, Silver, Bullion, Specie, Jewelry, Precious Stones or Metals, Paintings and Statuary, unless Bills of Lading are signed therefor and the value thereof therein expressed.

In accepting this Bill of Lading, the Shipper, Owner or other Agent of the Shipper or Owner of the Property carried, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written, printed or stamped, as fully as if signed by all of them.

Dated in New York, September 21st, 1917.

COMMERCIAL FORWARDING COMPANY,
By JOHN R. BROWN, *Master.*

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46 LIBELANT'S EXHIBIT 2.

T. F. Wilmot & Co.,

24 State Street.

No. 19690. New York, Oct. 4, 1917.

The Hanover National Bank of the City of New York.

Pay to the order of Commercial Forwarding Co., $5845.00/100 Fifty Eight Hundred Forty Five Dollars.

T. F. WILMOT & CO.

(Perforated:)
Paid.

(Stamped:)
Certified.
Payable only through
New York Clearing House

(Endorsed:)
Commercial Forwarding Co.
C. Lorenzo Smith.
Endorsement guaranteed.
Franklin Trust Co.

(Stamped on back:)
Received Payment
Through New York Clearing House
Oct. 4, 1917.
Franklin Trust Company.

(Stamped on back:)
Credited to account of
Commercial Forwarding Co.
Franklin Trust Company
46 Wall Street

G. H. J. Teller

Endorsement correct.

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47 LIBELANT'S EXHIBIT 3.

Important.

Franklin Trust Company,

46 Wall Street.

New York, Oct. 1, 1917.

T. F. Wilmot Co., 24 State St.:

We beg to advise that a sight draft on you for $6663.29 drawn by Commercial Forwarding Co. was presented this day and will be held at this office until 3 P. M. to-day. Unless payment is made before that hour the draft will be returned.

CLINTON W. LUDLUM, *Secretary.*

Checks must be certified.

CLAIMANT'S EXHIBIT A.

Memorandum of Agreement made and dated this 22nd day of August, 1917, between Boston Ship Brokerage Company, of Boston, Mass., part owner of the American schooner "Gracie D. Chambers," party of the first part, and Anthony Crawford and C. Lorenzo Smith, both of New York City, parties of the second part; witnesseth:

1. That the party of the first part agrees to sell to the parties of the second part at least a controlling interest in the said schooner and the parties of the second part agree to purchase such interest up to the whole of the said schooner upon the following terms and conditions.

48 2. The purchase price of the whole of the said vessel shall be Twenty-one thousand five hundred ($21,500) Dollars, and the interest conveyed shall be paid for pro rata upon the basis of Twenty-one thousand five hundred ($21,500) Dollars for the whole of said vessel.

3. Possession of the vessel to be turned over to the parties of the second part at once, subject, however, to the carrying out of the terms of this agreement, and the parties of the second part not to incur any liens against said vessel, but to pay cash against all bills until a controlling interest in the said vessel is transferred by the party of the first part.

4. Upon the signing of this agreement the parties of the second part agree to turn over to the party of the first part as security for the first deposit on the purchase price, bill of sale on the schooner "Emma S. Briggs" for 59/64ths, together with insurance policies covering marine and war risks in the sum of $20,000 with an assignment thereof to the party of the first part. The foregoing bill of sale and insurance policies with the assignment to be held in trust for the parties of the second part and to be returned to them upon the payment of the first deposit. As further security for the pay-

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ment of said deposit, the parties of the second part agree that before loading any cargo in the vessel, they will assign sufficient advance freight money to cover 25% of the purchase price and will arrange with the shipper that such freight be payable direct to the party of the first part upon signing of bills of lading unless released in writing by the latter.

5. The parties of the second part agree that upon receipt of the first advance freight and within fifteen days from date, they
49 will pay to the party of the first part 25% of the purchase price in cash, and the party of the first part agrees upon receipt thereof, to return the bill of sale, insurance policies and assignments on the "Briggs" to the parties of the second part. Within fifteen days and upon completion of the loading of the vessel and upon signing of proper bills of lading but before the vessel can clear, the parties of the second part agree to pay to the party of the first part cash sufficient to pay pro rata on the full purchase price for such interest in the vessel for which bills of sale are presented and delivered and to deposit for 30 days in a bank the balance of the purchase price subject to production and delivery by the party of the first part of additional bills of sale. And the parties of the second part agree that they will, by assignment or otherwise, before completing the loading or collecting any freight, arrange with the shippers so that sufficient advance freight money can be deposited direct with the bank or paid over to the party of the first part to carry out the aforementioned arrangement.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

ANTHONY CRAWFORD.
C. LORENZO SMITH.

50 *Opinion of the Court.*

United States District Court, Southern District of New York.

INTERNATIONAL PAPER COMPANY, Libelant,

against

SCHOONER GRACIE D. CHAMBERS, Respondent.

Stetson, Jennings & Russell, Proctors for Libelant.
Robinson Leech, Proctor for Claimant.

AUGUSTUS N. HAND, *District Judge:*

This is a libel to recover $5,845 freight charges paid on October 4, 1917, on account of papers shipped on the Schooner Gracie D. Chambers, consigned to Bordeaux, France. The bill of lading, dated September 21, 1917, recites that there shall be "shipped in

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apparent good order and condition by * * * in and upon the schooner called 'Gracie D. Chambers' * * * and now lying in the Port of New York and bound for Bordeaux" the merchandise above mentioned, which is

"to be delivered from the ship's deck, where the ship's responsibility shall cease, in like good order and condition, at the aforesaid port of Bordeaux, (the act of God * * * restraints of Princes and Rulers * * * howsoever excepted), * * * freight for said goods to be prepaid in full without discount, retained and irrevocably, ship and/or cargo lost or not lost, at the rate of — gross weight delivered."

51 On September 28, 1917, an order was issued by the Navy Department and the Treasury Department of the United States to the effect that no further clearance would be granted sailing vessels, any portion of whose voyage would take them through the war zone, and this order was conveyed by the Assistant Secretary of the Treasury to the Collector of Customs of New York by telegram on September 28, 1917, was received by the Collector on the morning of September 29th, and put into effect on that date.

The freight charges, amounting to $5,845, were paid on the 4th day of October, 1917, and the bill of lading was then delivered, signed by the master, containing the clauses above mentioned.

On October 5th the captain attempted to secure a clearance, which was denied by the Collector of Customs by reason of the order of the Treasury and Navy Departments above mentioned, and, subsequently, and after some attempt to have an exception to the order made in the case of this particular vessel, the agents of the vessel notified the owners of the cargo that the voyage had been abandoned, and that the cargo would be redelivered or stored for the account of the owners at their own risk and expense.

It appears that the ship's agents knew of the order forbidding clearance prior to the receipt of the freight charges, although both parties then hoped there might be an exception made in the case of this vessel.

It should be added that between September 22 and October 3 the vessel lay at the foot of 5th Street, East River, and on October 3 moved out into the stream to take on more cargo, save wharfage charges, and to await clearance. I think the contention of
52 the libelant that this change of position from the dock to the stream was only a change of berth and was not made as a commencement of the voyage is sustained by the evidence.

The interesting question arises whether the clause "retained and irrevocably, ship and/or cargo lost or not lost," governs the relations of the parties prior to the actual commencement of the voyage, or whether, until some freight has been earned, the prepaid freight can be recovered back in spite of the foregoing clause. I think there can be no doubt that under the general principles of maritime law, which have obtained in the United States and have been enun-

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ciated in The Tornado, 108 U. S., 342, that the prepaid freight could be recovered back if it were not for the special clause of the bill of lading.

In the case of National Steam Navigation Co. v. International Paper Co., 241 Fed., 861, the Circuit Court of Appeals, in an opinion by Judge Ward, discussed the law on the subject of prepaid freight and said that the English cases on that subject did not express the law of this country.. In England the freight prepaid by agreement cannot be recovered by the shipper and can be recovered by the shipowner in case of the loss of the goods. In the United States prepaid freight must be returned to the shipper if the goods do not arrive, and the shipowner cannot recover it back if not actually prepaid.

It is undoubtedly true in a general sense that clauses like the one in the bill of lading under consideration have been inserted in American contracts between shipowners and shippers in order to bring the commercial usage in this country within the English doctrine, and it appears to be true that in England, in spite of the drastic doctrine applicable to prepaid freight where the voyage has
53 commenced, the courts do not prevent recovery by the shipper if the vessel was never able to start upon her voyage. See Ex parte Nyholm, 29 L. T., 634; Weir & Co. v. Girvin (1900), 1 Q. B. Div., 45; The Great Indian Ry. Co. v. Turnbull, 53 L. T., 325.

In the case of Ocean Steamship Co. v. United States Steel Products Co., 239 Fed., 823, the Circuit Court of Appeals affirmed a decision by Judge R. Middletown Smith and dismissed a libel to recover freight upon the ground that the merchandise was burned at the wharf after loading on the vessel. He based his decision upon the ground that the bill of lading had not been delivered or tendered. He said also that the bill of lading agreed upon, though it contained a provision that the freight should be retained by the shipowner, the vessel or cargo lost or not lost, did not cover a case where the vessel had not entered upon her voyage, and no freight whatever had been earned.

It is urged by the respondent that the Restraint of Princes is an excepted peril and that the moment the goods were placed on board the special clause of the bill of lading applied, irrespective of the commencement of the voyage. In this case the goods were not completely loaded until September 29th, and on the morning of that day not only was clearance forbidden, but that fact had been communicated to the Collector of the Port. Thus no freight was earned and the voyage was completely frustrated before the bill of lading was signed. The English doctrine and the terms of the bill of lading are rigorous enough without extending such a drastic doctrine to a situation where the voyage had not in any sense begun. The doctrine of Judge Smith in Ocean S. S. Co. v. U. S. Steel Products Co., 239 Fed., 823, and the reasoning of Judge Rellstab in the
54 recent unreported case of Vacuum Oil Co. v. Sailing Vessel Allanwilde, would each indicate that prepaid freight in such a case is recoverable (Scrutton, 7th Ed., pp. 307-310).

The opinion of Judge Ward in National Steam Nav. Co. v. Inter-

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national Paper Co., 241 Fed., 861, is inapplicable, because there the ship had begun her voyage. While it is true that if the vessel had proceeded on her voyage a single mile the freight could not be recovered, I can see no reason for extending the exceedingly harsh provision of the bill of lading to the present case. Such a result would allow a ship to hold freight which was never earned and immediately to earn freight on another voyage to some unprohibited port. Such is not, I think, the purpose or fair meaning of the clause in question.

A decree is granted for libelant for $5,845, with interest from October 4, 1917, and costs.

Dated, December 28, 1917.

A. N. H., *D. J.*

55 *Final Decree.*

At a Stated Term of the District Court of the United States of America for the Southern District of New York, Held at the United States Court-rooms, in the Borough of Manhattan, City of New York, on the 7th Day of January, 1918.

Present: Honorable Augustus N. Hand, District Judge.

INTERNATIONAL PAPER COMPANY, Libelant,

against

THE SCHOONER OR VESSEL GRACIE D. CHAMBERS, Her Tackle, Apparel, Appurtenances, and Furniture, and All Persons Intervening for Their Interest Therein, Respondents.

This cause having come on for trial and having been heard on the pleadings, and proofs of the respective parties having been submitted and due deliberation having been had, and the Court having filed its opinion directing that the libelant recover against the above-named vessel the sum of $5,845 with interest thereon from the 4th day of October, 1917, and costs, and the costs having been duly taxed on notice in the sum of $61.37,

56 Now, on motion of Stetson, Jennings & Russell, proctors for the libelant, it is

Ordered, adjudged and decreed that the International Paper Company recover of and from the schooner Gracie D. Chambers, her tackle, apparel, appurtenances and furniture, and her claimant stipulators, the sum of $5,845, together with interest from October 4, 1917, amounting to $80.60, and the further sum of $61.37 costs as taxed, aggregating the sum of $5,986.97, and that the said schooner Gracie D. Chambers, her tackle, apparel, appurtenances and furniture be sold to pay the same.

And it is further ordered that the Clerk of this Court issue a Writ of Venditioni Exponas to the Marshal of the District for the sale of said vessel on board thereof, returnable upon four days' notice to

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claimant's proctor, the Marshal giving six days' notice of sale, pursuant to law.

And on like motion, it is further ordered that out of the proceeds of the sale of the said vessel when paid into the Registry of the Court, the Clerk of this Court pay to the libelant or to its proctors the amount due.

And on like motion of Stetson, Jennings & Russell, proctors for the libelant, it is further ordered that the Clerk, after deducting the taxed costs of the officers of the Court, distribute the proceeds in satisfaction of this decree, subject to all priorities as they now exist.

And it is further ordered that unless an appeal be taken from this decree within the time limited by law and the rules and prac-
57 tice of this Court, or unless same is satisfied, the stipulators for costs on the part of the claimant cause the engagement of their stipulation to be performed within ten days after service of a copy of this decree, with notice of entry thereof on the proctors for claimant, or show cause within four days after the expiration of said term, or on the first day of jurisdiction thereafter, why execution should not be issued against their goods and chattels and to enforce the satisfaction of this decree.

AUGUSTUS N. HAND, *D. J.*

A. G. Jr.

58 *Notice of Appeal.*

United States District Court, Southern District of New York.

International Paper Company, Libelant,

against

The Schooner Gracie D. Chambers, Her Tackle, etc.

Sirs: Take Notice that Florence G. Payne, the claimant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the final decree of this Court entered herein on January 9th, 1918, and from each and every part of said decree.

Dated, New York, January 9th, 1918.

Yours, etc.,

ROBINSON LEECH,
Proctor for Claimant.

27 Cedar Street, New York City.

To: Messrs. Stetson, Jennings & Russell, Proctors for Libelant, 15 Broad Street, New York City, and Alexander Gilchrist, Jr., Esq., Clerk.

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59 *Assignment of Errors.*

United States District Court, Southern District of New York.

INTERNATIONAL PAPER COMPANY, Libelant-Appellee,

against

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc.

The claimant herein, Florence G. Payne, hereby assigns error in the decision and final decree of the United States District Court for the Southern District of New York in the above-entitled suit as follows:

1. In that the District Court held that the libelant was entitled to recover.

2. In that the District Court failed to hold that the prepaid freight might be retained.

3. In that the District Court held that "the voyage had not in any sense begun."

4. In that the District Court failed to find that the voyage had begun, although the vessel had not left port.

5. In that although the District Court found that if the terms of the bill of lading applied, the prepaid freight could not be recovered back from the ship, it failed to hold that the bill of lading terms applied.

6. In that the District Court found that the provisions of the bill of lading were "harsh."

60 7. In that the District Court held that it was necessary to extend the provisions of the bill of lading "to the present case," and failed to hold that the circumstances were covered by the terms of the bill of lading.

8. In that the District Court held that it was not "the purpose or fair meaning of the clause" in the bill of lading to permit the ship to retain the freight.

9. In that the District Court granted a decree for libelant for $5,845, with interest from October 4th, 1917, and costs.

Dated, New York, January 9th, 1918.

ROBINSON LEECH,
Proctor for Claimant-Appellant.

27 Cedar Street, New York City.

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61 *Stipulation as to Record.*

United States District Court, Southern District of New York.

INTERNATIONAL PAPER COMPANY, Libelant-Appellee,

against

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc.; FLORENCE G. PAYNE, Claimant-Appellant.

It is hereby stipulated by and between the proctors for the respective parties hereto that the foregoing is a true transcript of the record of the District Court in the above-entitled cause as agreed on by the parties, and that it may be certified by the Clerk of this Court to the Clerk of the Circuit Court of Appeals as the transcript of record on appeal herein.

Dated, New York, January —, 1918.

STETSON, JENNINGS & RUSSELL,
Proctors for Libelant-Appellee.

ROBINSON LEECH,
Proctor for Claimant-Appellant.

62 *Clerk's Certificate.*

United States District Court, Southern District of New York.

INTERNATIONAL PAPER COMPANY, Libelant-Appellee,

against

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc.; FLORENCE G. PAYNE, Claimant-Appellant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the District Court in the above-entitled cause as agreed on by stipulation between the proctors for the respective parties.

In testimony whereof, I have caused the seal of said Court to be affixed at the City of New York, this — day of January, in the Year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-second.

ALEXANDER GILCHRIST, JR., *Clerk.*

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63 United States Circuit Court of Appeals for the Second Circuit.

INTERNATIONAL PAPER COMPANY, Libellant-appellee,

against

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc.; FLORENCE G. PAYNE, Claimant-appellant.

Before Ward and Rogers, Circuit Judges, and Learned Hand, District Judge.

Stetson, Jennings & Russell, for Libellant-appellee. R. L. von Bernuth and Frederick Cunningham, Jr., of Counsel.

Robinson Leech, for Claimant-appellant.

WARD, *Circuit Judge:*

September 14, 1917, the schooner Gracie D. Chambers began to load a general cargo in the Port of New York to be delivered at Bordeaux. Between September 27 and 29 the libellant Paper Company shipped 120 tons of print paper.

September 28 at 4.25 P. M. the Treasury Department at Washington telegraphed the Collector at the Port of New York to withhold clearance of all sailing vessels, any part of whose voyages would bring them within the danger zone. There was no official publication of this embargo but it was put into effect beginning September
64 29 by the refusal of clearance to such vessels as they applied for them. Both the shippers and the shipowners had heard rumors of the embargo as early as October 1.

October 3 the schooner moved out to an anchorage at the Red Hook Plats to save wharfage charges and to await clearance.

October 4 the freight was paid against delivery of the bill of lading.

October 5 the master applied to the Collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo on the ground that it had begun to load before the order was made. Refusal to allow an exception in her favor was not definitely and finally made until October 10. Subsequently the cargo was discharged and the owners refused to return the prepaid freight.

The bill of lading contained the following provisions:

"Restraints of Princes and Rulers excepted."

"Freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost."

Claimant relies on these clauses for a defense to the libel.

By our law freight is earned only upon delivery of cargo. The ship may have carried the cargo on a voyage of 3,000 miles and to within one mile of destination but the carrier has earned no freight and must return any freight prepaid if he has not delivered. The parties of course may agree upon a different rule and for that pur-

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pose a clause has been introduced into bills of lading and
65 charter-parties from time out of mind that prepaid freight shall not be returned "ship lost or not lost." The clause variously phrased is intended to cover all contingencies. If only the loss of the ship were contemplated the additional words "or not lost" would be meaningless. What the parties intend is that the carrier shall keep the freight even if he does not deliver the cargo, unless the failure to deliver be due to the carrier's fault or to a peril not excepted in the bill of lading or charter-party.

The clause in this bill of lading is not very artistically drawn because of the insertion of the conjunction "and" between the words "retained" and "irrevocably." Yet the meaning is perfectly clear; "retained and irrevocably, ship and/or cargo lost or not lost," means retained and irrevocably retained. In the case of the Allanwilde, 247 Fed. Rep. 236, the words were "retained and irrevocable," but the meaning is exactly the same, to wit, that the prepayment of freight wa sirrevocable and was to be irrevocably retained. The marine document in each case contained an exception of the restraint of princes. The Government's embargo was such a restraint and the exception covered it exactly as it would cover perils of the seas.

It is to be remembered that goods delivered to the carrier even before actual loading aboard are in his custody and that the maritime engagement is begun, the goods being bound to the ship for the freight and the ship bound to the goods for transportation in
66 accordance with the contract, Bulkley v. Naumkeag Co., 24 How. 386; Scott v. The Ira Chaffee, 2 Fed. Rep. 401. The money sought to be recovered in this case was paid as freight against delivery of the bill of lading, whether earned or not.

If the bill of lading had contained no exception of restraint of princes the Government's embargo would have been no defense to the carrier in a suit by the shipper upon the bill of lading. The shipper would have been entitled to recover the prepaid freight and damages for the carrier's failure to deliver. The apparently inequitable result in this case is a temptation to interfere in a contract made by parties perfectly competent to contract and contracting in the face of the very emergency which subsequently arose. This is to be especially avoided in construing familiar and long-established provisions in commercial documents. The District Judge in the case of the Allanwilde, supra, made an additional suggestion to the effect that the carrier was bound to transship the cargo. That, however, is a discretion which is to be properly exercised on behalf of the shipper when he is not present or cannot be communicated with, which is not this case. It is also a privilege which the law gives the master as representing the owner to earn his freight if he will lose it by abandoning the voyage.

The District Judge thought that if the ship had broken ground, e. g., if she had sailed a mile, the prepaid freight might be retained.
Clearly it could not be retained for that reason because under
67 our law it is not earned until delivery of the cargo. Only the clause in the bill of lading could authorize the retention.

The case of the Tornado, 108 U. S. 342 is not applicable. The

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voyage in that case was completely frustrated by a fire which rendered the ship unseaworthy and unable to proceed within a reasonable time. The question involved was the right to transship the cargo. The carrier claimed a lien upon the cargo for his freight on the ground that he had been deprived of his right to transship it and so earn his freight. No freight was prepaid or payable and none had been earned. The court held that the parties had contracted with reference to a particular vessel which no longer existed and likened the case to that of Taylor v. Caldwell, 3 Best & Smith 826, in which the owner of a music hall was excused from his contract to let it for a performance because it had been burned down. If the contract in the case of the music hall had contained a provision that the owner was to be liable even if it burned down the conclusion would obviously have been different. The House of Lords in the case of Coker v. Limerick S. S. Co., 34 Law Times Rep. 18, lately decided that the shipowner was entitled to recover freight payable on signing bills of lading although the vessel and cargo were burned during the loading and before the voyage began but after bills of lading were signed, the English law on the subject of prepaid freight being the same without any specific contract as our law is when the contract provides that it shall be retained.

Our decision in National Steam Navigation Co. v. International Paper Co., 241 Fed. Rep. 86 requires the decree to be reversed
68 and what was said in Ocean S. S. Co. v. U. S. Steel Products Co., 239 Fed. Rep. 823, as to the retaining of prepaid freight, being concededly obiter, is not controlling.

Decree reversed.

69 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. International Paper Company against The Schooner Gracie D. Chambers. (Copy.) Opinion. Ward, Circuit Judge.

70 United States Circuit Court of Appeals, Second Circuit.

INTERNATIONAL PAPER COMPANY

against

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc., FLORENCE G. PAYNE.

LEARNED HAND, *D. J.*:

Under the American rule, prepaid freight, which is not earned till the voyage is completed, may be recovered back, Griggs v. Austin, 3 Pick. 20. Hence under our law the claimants must rely wholly upon the clause in the bill of lading. It must be conceded that in England prepaid freight is now recoverable even though the ship have never broken ground but is burned at her pier, Coker vs. Limerick S. S. Co., 34 Times Law Reports 18. We have therefore to determine what meaning to ascribe to language which like all that

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used in such documents is scarcely more than a skeleton of the thought's body. Much could be said for the libellant's position had the clause merely read "retained irrevocably," but it did not. We must take the addition as qualifying the meaning by the conditions which it introduces. The loss of the ship is one condition and it is urged that the other includes every possible contingency in which the ship is not lost. Read verbally this may be so; certainly I do not doubt that it covers cases in which the ship is not lost. Yet if one in this way makes the two alternatives logically exhaustive, the result is to give no meaning whatever to the added conditions. They can, I think, hardly have been intended merely as an intensive, and if they have any qualifying value at all, I see no other
71 so natural as to include contingencies which should frustrate the venture after its inception. At least, this, it seems to me, is the most extended meaning which it can have.

So much for more textual consideration of the language. However, as in all such cases, the meaning of words is best gathered from the purpose that informed them, and that purpose taken from the standpoint of a fair observer was to meet the possible difficulties which might arise in the performance of the contract. If a ship breaks ground and is lost *of* returns to her port of departure, the shipper has got nothing for his freight. From his view it is an injustice that the ship should hold prepaid freight. Yet the ship has performed part of the service and from its view the prepayment may be taken at least in part as compensation for the service so far performed. The ship has given a part of her time; her loss is actual. There is, therefore, an entirely understandable reason why the shipper should accept the hazard of the voyage once begun. A nicer justice might, it is true, apportion the prepayment to such time as the ship had in fact lost, if the frustration was partial, but there are obvious practical difficulties in such a course.

This, however, is not the case of frustrating a voyage, but a contract, and, looked at from the time when the contract was made, it can hardly be thought that the shipper was to bear not only the chance of the voyage but of the contract. Because, if the contract be frustrated before loading the ship has lost nothing, and if the frustration occurred before breaking ground, at most nothing beyond detention while loading and discharging. She remains
72 available for carriage during the same period as before. If one construes the clause as justifying her retention of the prepaid freight, she is in effect given two freights for the same period. Such a conclusion can hardly be within the compass of what the shipper would have conceded or the owner demanded, had they been faced with the possibility at the outset. Therefore, I think the result was not within the intention of the parties when in one way or another some construction must be imposed upon a mere outline of intent like this. I conclude, therefore, that the clause applies to the voyage only, and that if the voyage be frustrated in limine, that is, before ground broken, it does not entitle the owner to retain the freight.

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The authorities, so far as they go, are at least not to the contrary. In The Tornado, 108 U. S. 342, the ship was destroyed at her pier and the owner sued the cargo demanding freight because he had not been allowed to complete the voyage in another bottom. The headnote says that the freight was to be paid upon delivery, but an examination of the record does not bear out the statement. In any event the court decided that the shipper was absolved from further performance on account of the frustration of the voyage in limine. The implication at least was that had the vessel broken ground the result might have been different. While it is hard to see how the owner could in any case have recovered more than damages, that point was not raised, and the case seems to me an authority for the proposition that a frustration in limine puts an end altogether to the contract of affreightment. Now I suppose no one would contend that the result would be different as to this clause if the ship had been burnt. If so, I cannot quite see why the owner should be allowed
73 to keep his unearned freight and yet under The Tornado, supra, not be allowed to sue because he was prevented from earning the freight. The Alla-wilde, 247 Fed. R. 236 went further than need be here, further perhaps than I should care to go. I have found no other case in point. Prepayment clauses under our law must be construed as intended for security rather than insurance to the owner. I am disposed therefore to look narrowly upon a clause like this which seeks to impose upon a shipper not only the risks of a voyage, but a gratuity for a voyage never undertaken. I dissent.

74 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. International Paper Company against The Schooner Gracie D. Chambers, her tackle, etc., Florence G. Payne. (Copy.) Dissenting Opinion. Learned Hand, D. J.

75 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court-rooms, in the Post Office Building, in the City of New York, on the 27th day of May, One Thousand Nine Hundred and Eighteen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges; Hon. Learned Hand, District Judge.

INTERNATIONAL PAPER COMPANY, Libellant-Appellee,

v.

SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc., FLORENCE G. PAYNE, Claimant-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

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On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.

H. W. R.

76 Endorsed: United States Circuit Court of Appeals, Second Circuit. International Paper Co. v. "G. C. Chambers." Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1918. William Parkin, Clerk.

77 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 76 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of International Paper Company against Schooner "Gracie D. Chambers" as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of May in the year of our Lord One Thousand Nine Hundred and Eighteen and of the Independence of the said United States the One Hundred and Forty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

78 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which the Schooner "Gracie D. Chambers," her tackle, etc., Florence G. Payne, Claimant, is appellant, and International Paper Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do

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79 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of June, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

80 [Endorsed:] File No. 26562. Supreme Court of the United States, October Term, 1917. No. 1095. International Paper Company vs. The Schooner "Gracie D. Chambers," etc. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 26, 1918. William Parkin, clerk.

81 United States Circuit Court of Appeals for the Second Circuit.

THE SCHOONER GRACIE D. CHAMBERS, Her Tackle, etc., FLORENCE G. PAYNE, Claimant-Appellant,

v.

INTERNATIONAL PAPER COMPANY, Appellee.

It is hereby stipulated that the certified copy of the transcript of record herein now on file in the office of the Clerk of the Supreme Court of the United States may be taken as a return to the Writ of Certiorari issued by the Supreme Court of the United States to this Court on the 17th day of June, 1918, and that the same shall be corrected by striking from the opinion of Ward, J., the following sentences:

"* * *. If the bill of lading had contained no exception of restraint of princes the Government's embargo would have been no defense to the carrier in a suit by the shipper upon the bill of lading. The shipper would have been entitled to recover the prepaid freight and damages for the carrier's failure to deliver."

ROBINSON LEECH, *Proctor for Appellant.*
STETSON, JENNINGS & RUSSELL,
Proctors for Appellee.

82 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of

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counsel is hereto annexed, and certified as the return to the writ of certiorari issued herein.

Dated, New York, July 1st, 1918.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

83 [Endorsed:] 479/26562. United States Circuit Court of Appeals, Second Circuit. International Paper Company v. "Gracie D. Chambers." Return to Certiorari. 1.70.

84 [Endorsed:] File No. 26562. Supreme Court U. S., October Term, 1918. Term No. 479. International Paper Company, Petitioner, vs. Schooner "Gracie D. *Richards,*" Her Tackle, &c. Writ of Certiorari & Return. Filed July 6th, 1918.

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Office Supreme Court, U. S.
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CLERK.

No. [redacted]479

Supreme Court of the United States.

OCTOBER TERM, 1917.

INTERNATIONAL PAPER COMPANY,
Petitioner,
against
THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, ETC., FLORENCE G. PAYNE, CLAIMANT,
Respondent.

PETITION AND MOTION, WITH NOTICE, FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. CANNON,
Proctor for Petitioner.

C. G. Burgoyne Printing Business, 72-78 Spring St., New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1917.

INTERNATIONAL PAPER COMPANY,
Petitioner,

AGAINST

THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, ETC., FLORENCE G. PAYNE, Claimant,
Respondent.

The schooner "Gracie D. Chambers," her tackle, etc., and Florence G. Payne, Claimant, are hereby notified that the International Paper Company, Petitioner, will, on Monday, the 3rd day of June, 1918, upon its petition and a copy of the entire record in the case, upon the opening of the Court on that day or as soon thereafter as counsel can be heard, submit a motion, copies of which and of the petition for writ of *certiorari* and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States in the Court Room at the Capitol in the City of Washington, D. C.

WILLIAM C. CANNON,
Proctor for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1917.

INTERNATIONAL PAPER COMPANY,
Petitioner,

AGAINST

THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, ETC., FLORENCE G. PAYNE, Claimant,
Respondent.

Comes now International Paper Company, by William C. Cannon, its counsel, and moves this Honorable Court, that it shall upon *certiorari* or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, require said court to certify to this court for its review and determination a certain cause in said Circuit Court of Appeals lately pending wherein the respondent The Schooner *Gracie D. Chambers*, her tackle, etc., was respondent, Florence G. Payne was claimant-appellant and your petitioner, International Paper Company, was libellant-appellee, and to that end it now tenders herewith its petition and brief and a certified copy of the entire record in such cause in said Circuit Court of Appeals.

WILLIAM C. CANNON,
Proctor for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1917.

INTERNATIONAL PAPER COMPANY,
Petitioner,

AGAINST

THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, ETC., FLORENCE G. PAYNE, Claimant,
Respondent.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of International Paper Company, respectfully shows to this Honorable Court as follows:

International Paper Company in the above named cause seeks to recover from the Schooner "Gracie D. Chambers," her tackle, etc., Florence G. Payne, claimant, the sum of $5,845, freight charges, paid on October 4th, 1917, to the Commercial Forwarding Company, on account of 120 tons of paper, consisting of 352 rolls to be shipped on the schooner "Gracie D. Chambers," consigned to Bordeaux, France (fols. 4 to 14, 29 to 30, libellant's exhibit 1).

The case was tried in November, 1917, and the District Judge held that the freight money prepaid by petitioner could be recovered back. A final decree was entered in favor of International Paper Co. for $5,986.97; upon the appeal to the Circuit Court of Appeals for the Second Circuit, judgment entered upon the decree was reversed, District Judge LEARNED HAND, dissenting, that Court holding that your petitioner, then libellant-appellee, was not entitled to the recovery of the freight pre-paid.

The essential facts with respect to the cause of action, in substance, are as follows:

Between September 27 and October 3rd, 1917, the "Gracie D. Chambers" lay at a wharf in the Port of New York and

received a cargo consisting principally of barrels of oil, paper and wire rolls.

The cargo was loaded on the schooner between September 27th and September 29th, 1917. On September 28th, 1917, the Treasury Department at Washington telegraphed the Collector at the Port of New York to withhold clearance of all sailing vessels, any part of whose voyages would bring them within the war zone. This telegram was received by the Collector at New York on the morning of September 29th, 1917, and put into effect at once. There was no official publication of this embargo, but clearances were refused to such vessels as applied for them from that day on. On October 3rd the schooner moved to an anchorage at the Red Hook Flats to complete loading, to save wharfage charges, and to await clearance. On the 4th day of October, 1917 (Libellant's exhibit 2) freight charges were paid for the account of the International Paper Company, and a bill of lading on a printed form furnished by the agents of the vessel was delivered to the agents of the International Paper Company (fols. 34 to 39–43). This bill of lading contained a clause excepting the ship from liability for " restraints of princes and rulers " and also a clause " freight to be prepaid in full without discount, retained and irrevocably, ship and or cargo lost or not lost " (Libellant's Exhibit 1).

It appears that the shipper knew, and the ship owners had heard rumors, of the embargo as early as October 1st, 1917. On October 5th, the master of the vessel applied to the Collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo on the ground that it had begun to load before the order was made. The authorities at Washington refused to allow an exception in her favor on October 10th; the voyage was abandoned, the cargo was then distributed to the shippers and the owners of the vessel refused to return the prepaid freight.

The case was presented to the Circuit Court of Appeals for the Second Circuit as well as to the District Court, by your petitioner, then the libellant, principally upon two theories: first, that the bill of lading provision with respect to prepaid freight did not prevent a recovery back of such freight because the ship had not sailed; and, second, that the restraints of

princes and rulers clause did not apply because the embargo created by the Treasury order of September 28, 1917, had put an end to the contract and that there was a commercial frustration of such contract before the loading of the petitioner's paper was completed or the freight moneys became due and payable or were paid even under the contention of the respondent, then the claimant.

There is considerable discussion both in the prevailing opinion of Judge WARD and in the dissenting opinion of Judge LEARNED HAND as to the effect of the clause with respect to the prepaid freight entitling a retention of the freight moneys, in any event, after they had once been paid or become due and payable. But whatever Judge WARD in his prevailing opinion may have said on the subject, he held that had it not been for the existence of the restraints of princes and rulers clause your petitioner would have been entitled to the return of the freight moneys. Judge WARD said as follows :

> " If the bill of lading had contained no exception of restraint of princes, the Government's embargo would have been no defense to the carrier in a suit by the shipper upon a bill of lading. The shipper would have been entitled to recover the pre-paid freight and damages for the carrier's failure to deliver."

So that in the last analysis the decision of the Circuit Court of Appeals for the Second Circuit is based upon the proposition that the restraint of princes and rulers created by the order of the Treasury Department of September 27, 1918, prevents a recovery of the pre-paid freight moneys. We respectfully submit that the Circuit Court of Appeals erred in deciding this question adversely to your petitioner, because the embargo or frustration of the contract of shipment occurred before the completion of the loading and before the bill of lading was delivered, so that the contract was terminated and the adventure frustrated before any liability for freight moneys had arisen.

While concededly the parties by the terms of their contract. as evidenced by the bill of lading, could have provided that freight once paid could not be recovered back in any event, it is our contention that under the decisions both in England and

the United States the bill of lading provision relied upon by the respondent in this proceeding that " freight to be prepaid in full without discount retained and irrevocably, ship and or cargo lost or not lost," did not constitute such a contract. It is also the contention of the petitioner that the exception in the bill of lading for " restraints of princes and rulers " does not apply because *(a)* the earning of freight moneys had never attached to the contract of shipment and *(b)* the embargo created by the Treasury Department order of September 28th, 1917, constituted a commercial frustration of the contract before the freight moneys were paid or became payable even under the contention of the respondent.

The law of the United States is that no freight is earned or payable until a successful completion of the voyage.

The Tornado, 108 U. S., 342.

This case also holds that no freight is commenced to be earned until a vessel has broken ground for the voyage, which does not occur until she moves with the intention of leaving the harbor on the voyage. Nor does a change of berth from a dock to the stream pending the completion of preliminaries constitute breaking ground or commencing of the voyage.

Gilchrist Transportation Co. vs. Boston Ins. Co., 233 Fed., 716.

Such is also the English law.

Curling vs. Long, 1 Bos. & Pull., 634.

While in England prepaid freight cannot be recovered *if the vessel has started on her voyage*, even without any provision in the bill of lading with respect to the retention of the freight moneys, such is not the case under the American law.

Burn Line vs. U. S. & A. SS. Co., 162 Fed., 298.
The Kimball, 3 Wallace, 37, 45.

The phrase that prepaid freight was to be retained " ship lost or not lost " was inserted both in the United States and Continental bills of lading to conform the practice in this and foreign countries with respect to prepaid freight to the English Admiralty law. This phrase which appears in varying forms, some of them considerably stronger in favor of the ship and its owners, than the one used in the case now before this Court, has not been construed in this country or

in England where the law is more stringent against the cargo owners to prevent a recovery of the freight moneys where the vessel has not commenced her voyage.

Ex parte Nyholm, re Child, 29 Law Times, 634 Chan., 1873.

Weir & Co. vs. Girvin, Law Reports 1900, 1 Q. B. Div., 45.

Great Indian Peninsular R. R. Co. vs. Turnbull, 53 Law Times, 325, *1 Cab & E., 595 ; 5 Asp. M. C., 465.*

Ocean S. S. Co. vs. U. S. Steel Producte Co., 239 Fed., 823.

The recent decision of the House of Lords in the case of *Coker & Co., Ltd. vs. Limerick Steamship Company, Ltd.*, 34 Law Times Reports, 18, referred to in the opinion of Judge WARD, does not in the opinion of your petitioner overrule the decisions respecting the questions involved in the case at bar, which were concerned in the above-mentioned English cases, but if it does then there is also a divergence of opinion in the English Courts. The only issue litigated in the *Coker* case was, what portion of the charter hire became payable where part of the cargo had been loaded, and as to which some, but not all, of the bills of lading had been signed. None of the Lords in their opinions referred to the earlier decisions in *Ex-parte Nyholm, Weir vs. Girvin*, or *Great Indian Peninsular Railway Company vs. Turnbull*, and there certainly was no indication that it was the intention of the Lords to overrule or question the authority of those cases.

Your petitioner believes its position is correct despite the reference of the Circuit Court of Appeals for the Second Circuit to its decision in the case of *National Steam Navigation Co. vs. International Paper Co.*, 241 Fed., p. 61, where a somewhat similar bill of lading clause was involved, because in that case the vessel had already commenced her voyage and had left the harbor of New York before the loss occurred. The earning of the prepaid freight moneys had begun and could not be recovered back because of the the bill of lading provision that the prepaid freight should not be returned "goods lost or not lost".

In the case of *The Allanwilde*, 247 Fed. Rep., 236, a clause in the bill of lading very similar to that contained in the bill

of lading in the case at bar, was held not to prevent the recovery of freight moneys on a cargo of a sailing vessel, whose departure was prevented by the very same order of the Treasury Department involved in the present action.

Your petitioner deems that the questions above set forth, which are involved in this proceeding, are of such gravity and importance that there should be a review and decision by this Court for the following reasons :

1. The order of the Treasury Department of September 28th, 1917, preventing the clearance of sailing vessels any part of whose voyage would carry them through the war zone, affected, as your petitioner is informed and believes about three or four million dollars of freight moneys on cargoes on sailing vessels in ports of the Atlantic seaboard and many proctors representing ships and cargoes have communicated with your petitioner's proctors concerning the progress of this case, which is generally regarded as the test case on the issues involved. The questions involved in determining the liablity for such freight moneys, are similar to that of your petitioner's, and a decision of your petitioner's case will settle and determine practically all the questions arising under the Treasury Department order relating to such freight moneys. In this connection your petitioner also desires to call attention of this court to the fact that similar questions are involved as a result of the recent action of the United States Government in refusing clearance to Dutch steam vessels.

2. The important questions of liability for freight moneys where loss occurs and a vessel has not commenced her voyage and the bill of lading contains the usual provision that freight is to be prepaid and retained " vessel or cargo lost or not lost," or phrases similar thereto has never been before the Supreme Court for its decision.

3. The case of " *The Allanwilde*," 247 Fed. Rep., 236, is in accord with the decision of the District Court in the case at bar, but contrary to the decision of the Circuit Court of Appeals. In the *Allanwilde* case the Allanwilde Transportation Co. appealed from the decree entered by District Judge RELLSTAB to the Circuit Court of Appeals for the Third Circuit which rendered no decision on said appeal, but has requested instructions from the United States Supreme Court

on the following questions, which case is now pending in this Court:

1. Was the adventure frustrated, and was the contract evidenced by the charter-party and by the bill of lading issued to the Oil Co. dissolved, so as to relieve the carrier from further obligation to carry the oil?

2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved so as to relieve the carrier from further obligation to carry the nails?

4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

Your petitioner presents herein as a part of this petition a brief showing more fully its views upon the questions involved, and a certified transcript of the record of the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court upon a day certain, to be therein designated, a full transcript of the record of all the proceedings of the said Circuit Court of Appeals in this case, which was entitled in that court "International Paper Company, Libellant-Appellee, against The Schooner Gracie D. Chambers, her tackle, etc., Florence G. Payne, Claimant-Appellant," to the end that said cause may be reviewed and determined by this Court, as required by law, and that your petitioner may have such other and further remedy in the premises as to this Court may seem appropriate, and that the judgment of said Circuit Court of Appeals may be reversed by this honorable Court.

INTERNATIONAL PAPER COMPANY,
By WILLIAM C. CANNON,
Its Proctor.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1917.

INTERNATIONAL PAPER COMPANY,
Petitioner,

AGAINST

THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, ETC., FLORENCE G. PAYNE,
Respondent.

BRIEF ON BEHALF OF INTERNATIONAL PAPER COMPANY IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This cause was before the Circuit Court of Appeals for the Second Circuit, and upon a writ of error that Court held that the Libellant-Appellee International Paper Company was not entitled to the recovery of the freight charges paid, and ordered, adjudged and decreed that the decree of the District Court be reversed.

Facts.

This libel was brought to recover the sum of $5,845 freight charges paid on October 4, 1917, to the Commercial Forwarding Company on account of 120 tons of paper, consisting of 352 rolls shipped on the schooner "Gracie D. Chambers", consigned to Bordeaux, France (fols. 4–14, 29–30, libellant's Exhibit 1).

Between September 27 and October 3, 1917, the "Gracie D. Chambers" lay at the foot of Fifth Street, East River, City of New York, and received a cargo consisting principally of barrels of oil, paper and wire rolls. On October 3, 1917,

she moved out into the stream to take more cargo, to save wharfage charges and to await clearance (fols. 31-33, 101-103). The change of position from the dock to the stream was only a change of berth and was not made as the commencement of the voyage (fol. 33). At that time loading had not been completed (fol. 32).

The paper of the libellant was loaded on the schooner between September 27 and September 29 (fol. 62). On September 28, 1917, an order was issued by the Treasury Department of the United States to the effect that no further clearance would be granted sailing vessels if any portion of their voyage would take them through the War Zone. This order was conveyed by a telegram to the Collector of Customs at New York City, dated September 28, 1917, signed by Assistant Secretary of the Treasury Rowe (fols. 45-50). The telegram was received by the Collector at New York on the morning of September 29, 1917, and put into effect at once (fols. 45-50).

On October 1, 1917, a sight draft for $6,666.29 for freight charges was presented by the Franklin Trust Co. to T. F. Wilmot & Co., the ship brokers of the libellant (libellant's exhibit 3). As this amount was incorrect under an arrangement made between the brokers and the Commercial Forwarding Company, which was acting for the "Gracie D. Chambers," an adjustment of the freight charges was made and they were fixed at the sum of $5,845, which amount was paid by T. F. Wilmot & Company for the account of the International Paper Company to the Commercial Forwarding Company on the 4th day of October, 1917 (libellant's exhibit 2), between the hours of two and three o'clock in the afternoon. At the same time a bill of lading on a printed form furnished by the agents of the vessel, the body of which had been filled out by Messrs. T. F. Wilmot & Co., and which was signed by the Master of the vessel, was delivered to T. F. Wilmot & Co. (fols. 34, 39-43). This bill of lading contained a clause excepting the ship from liability for "restraints of princes and rulers," and also a clause "freight to be prepaid in full without discount, retained and irrevocably, ship and or cargo lost or not lost" (libellant's exhibit 1).

It appears that Messrs. Smith & Crawford, who were doing business as Commercial Forwarding Company (fol. 64) had knowledge that the order of the Treasury Department was in effect prior to the time that they received the freight money

from the libellant's agents on October 4, 1917. On October 1, 1917, they read articles in the newspapers stating that there were rumors of an order which forbade the clearance of sailing vessels where the voyage required passage through the War Zone, and on either September 29 or October 1, a man from the office of the Commercial Forwarding Company (who was not produced on the trial) went to the office of the Collector of Customs at New York for the purpose of ascertaining the terms of such order, and he made a report the next day (fols. 121–123). His testimony was not produced and it must be presumed that he made a correct report of the results of his investigation.

It further appears that Messrs. Smith & Crawford conferred with their counsel on October 1, 2 and 3, 1917, regarding the order forbidding the clearance of sailing vessels, and that on October 2 or 3, 1917, which was a day or two before the freight moneys were paid, they ascertained that such order was actually in effect, and that they were then advised by their counsel to make every effort to clear the vessel at once (fols. 124–127).

In addition to this there is in evidence the Eighth paragraph of the answer of Messrs. Smith & Crawford, doing business as the Commercial Forwarding Company, as claimants, in a libel in Admiralty, filed by Oscar L. Richard and others, against the "Gracie D. Chambers," in the United States District Court for the Eastern District of New York. This answer was verified by both Messrs. Smith and Crawford, and contains a statement that they, as claimants in that proceeding, knew of the order and embargo on October 1, 1917. This answer, according to the testimony of Mr. Crawford, was prepared by Mr. Leech, as their Proctor, after several telephone conversations with Mr. Crawford, in which Mr. Crawford told Mr. Leech everything he knew concerning the facts in the matter (fols. 75–80, 98–100).

Because of the fact that the vessel was waiting for more cargo, and for payment of the freight involved in this action, the master of the vessel did not receive instructions or attempt to secure clearance of the vessel until October 5, 1917 (fols. 35, 37, 85, 92, 95, 97, 108, 117, 118). Clearance was denied the master by the Collector of Customs

under the order received by him on September 29, 1917 (fols. 9, 10, 21, 35, 37). Although the Commercial Forwarding Company attempted to have an exception made in the case of the " Gracie D. Chambers ", its application was refused on or about October 10 or 11, 1918, and the Commercial Forwarding Company informed the owners of the cargo that the voyage had been abandoned on account of the refusal of clearance, and that the cargo would be redelivered or stored for the account of the owners thereof, at their own cost and responsibility (fols. 9–11, 21, 22, 124–127).

T. F. Wilmot & Company, who acted as brokers for the petitioner, the libellant, had no definite knowledge of the existence of the order forbidding clearance until this case arose (fol. 44).

The respondent, Florence G. Payne in this proceeding, the claimant below, was the conditional vendor of the vessel under a bill of sale (Claimant's Exhibit A, fols. 140–146). The payments provided for in the bill of sale had not been completed (fol. 65) and the rights of the respondent herein rest on the proposition that title to the vessel had not passed to Messrs. Smith & Crawford, who were doing business as Commercial Forwarding Company.

POINT I.

Petitioner is entitled to recover the prepaid freight:

(a) **Because there is no inception of the earning of freight until the ship breaks ground for the voyage.**

(b) **Because the same rule applies to prepaid freight in the absence of a clearly expressed contract to the contrary.**

(c) **Because the provisions of bill of lading involved in this proceeding cannot be construed to be such a contract.**

(a) Both in England and in the United States the inception of the earning of freight occurs at the time the vessel breaks

ground for her voyage, and not upon receiving cargo or doing any act preparatory to sailing.

It is well settled law in this country that freight is not earned, or commenced to be earned, until the vessel breaks ground or starts upon her voyage. Breaking ground for the voyage does not occur until the vessel moves with the intention of leaving the harbor on her voyage. The leading case on the subject is "*The Tornado*," 108 U. S., 342. In that case the ship was lying at her dock in New Orleans loading a cargo of cotton. Before she had finished loading, fire broke out on board, which resulted in the sinking of the ship at her dock, so that she was unable to make her voyage. Part of the cargo was saved and sold by order of the court. The shipowners then sought to recover freight from the shippers for that part of the cargo which had been put aboard. It was held by the Supreme Court of the United States that there could be no recovery as no freight had been earned or could have commenced to be earned until the ship broke ground for the voyage.

Mr. Justice BLATCHFORD said, on page 349:

> "We are of opinion that by the disaster which occurred before the ship had broken ground or commenced to earn freight, circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. * * * All the fundamental conditions forming part of the contract of the shipowner were wanting at the time when the earning of freight could commence. * * *
>
> "It is an inherent element in a contract of affreightment under a bill of lading that the vessel shall enter on the voyage named, and begin the carriage of goods shipped, or, as it is technically called, break ground, before a claim to freight money can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods."

There can be no breaking of ground for the voyage until after the vessel has secured clearance and has completed all acts necessary and preliminary to sailing. A change of berth from

the dock to the stream pending the completion of such preliminaries does not constitute breaking ground for, or a commencement of, the voyage.

Gilchrist Transportation Co. v. Boston Ins. Co., 223 Fed., 716.

See also

Wood v. Hubbard, 62 Fed., 753.

The leading English case is *Curling v. Long*, 1 Bos. & Pull., 634. In that case the ship while lying in harbor at Jamaica was cut out by French privateers and carried to sea. She was later captured by a British ship and carried into a nearby port where her cargo was sold. It was held that since she had not broken ground for her voyage, no freight could be recovered by the shipowners because no freight had been earned.

While certain obligations on the part of the vessel, such as the liability of a bailee or carrier, may arise upon delivery to it of the cargo, none of the rights or obligations attendant upon the payment of freight moneys arise until the commencement of the voyage. None of the cases which have been cited by the claimant are authority for the proposition that the liability for freight arises upon receipt of the goods on board or alongside the vessel, and all the cases which we refer to under this point affirm and reaffirm the doctrine that freight is paid for actual transportation and not for receiving the cargo.

(b) As regards *prepaid* freight, the English and American rules differ. In the United States, if the freight is prepaid and the voyage has commenced, it may be recovered back in the absence of an express stipulation to the contrary, if there is a failure to deliver the cargo.

Burn Line v. U. S. & A. S. S. Co., 162 Fed., 298.
The Kimball, 3 Wallace, 37, 45.
DeSola v. Pomares, 119 Fed., 373 (S. D. N. Y.).
Watson v. Duykinck, 3 Johns., 335.
Mitsui v. St. Paul Fire Ins. Co., 202 Fed., 26.

In England, prepaid freight may not be recovered *if the ship has sailed*, even though there is a total failure to deliver the cargo.

Byrne v. Schiller, L. R., 6 Exch., 319; 25 L. T. Rep., N. S., 211.
Allison v. Bristol Ins. Co., 1 App. Cas., 209, 224.

It is recoverable, however, if payable and paid before the ship has sailed, or if payable or paid during the voyage but after the ship is lost, even though the contract contains the "ship lost or not lost" clause.

Ex Parte Nyholm ; Re Child, 29 Law Times, 634, Chanc. (1873).
Weir & Co. v. Girvin, L. R. (1900), 1 Q. B. Div., 45.
Great Indian Pena. Ry. Co. v. Turnbull, 53 Law Times, 325 ; 1 Cab. & E., 595 ; 5 Asp. M. C., 465.
Scrutton, 8th Ed. (1917). Art. 137, p. 322.

In the *Great Indian Peninsular Railway Company* case, *supra*, the charter-party contained the following provision : "four-fifths of the freight * * * to be advanced and paid in cash one month from the vessel's sailing * * * (steamer lost or not lost)." The ship sailed, but was lost before one month was up, and the charterers paid the freight with knowledge that the ship had been lost. It was held that the charterer could recover the advanced freight paid by him, notwithstanding the clause "steamer lost or not lost".

DENMAN, J., said :

> "It is contended * * * that the money paid in pursuance of this clause is paid, not as freight, but as a consideration for taking the goods on board * * *. In my opinion there is nothing to show that the real bargain is other than it is expressed to be in the charter party, namely, that the money should be paid as freight * * *. I think that the freight in so far as it had been paid by the plaintiffs, was clearly a part of their loss, and that they ought to recover it from the defendants."

In *Weir & Co. v. Girvin, supra*, two-thirds of the freight was to be "due and paid" when the ship was three days out, "ship lost or not lost". Part of the cargo was burned at the dock and fire was one of the expected perils, but the ship sailed nevertheless. It was held that no freight on the portion of the cargo burned could be recovered by the ship owners, as it never had commenced to be earned.

COLLINS, L. J., said :

> "It is contended that the freight is finally ascertained as soon as the cargo is put on board, and so

> fixes once for all the amount of advanced freight * * *. The undertaking expressed in the words 'lost or not lost' * * * is not an answer, * * * for it is an express provision that the calculation of the probable freight was to be displaced in one event, namely, the loss of the vessel. I agree that the provision for that one event does not cut down the rights of the parties with regard to other events provided for by the charter party."

VAUGHAN WILLIAMS, L. J., said :

> "There was a time in the history of the law after the judgment in *Kirchner v. Venus*, when it was supposed that advanced freight and freight were different * * *. The opinions of the law lords in that case *(Allison v. Bristol Marine Ins. Co., supra)* make it clear that that view was incorrect and that 'freight,' whether used in respect of advanced freight or otherwise, always has the same meaning."

See, also, *Allison v. Bristol Marine Ins. Co.*, 1 App. Cas., 209.

That case finally disposed of the suggestion that there might be a difference between advanced freight and freight proper, first put forward in *Kirchner v. Venus*, 12 Moo. P. C., 361. The House of Lords held that no such distinction could be drawn and that advanced freight was to be treated in all cases in the same manner as freight, in the absence of a controlling agreement to the contrary.

In *Ex parte Nyholm, Re Child, supra*, by the terms of the charter party, the charterers promised to "pay * * * as freight" at a certain rate, "the payment of which is to become due and be made as follows: £250 to be advanced in cash on signing bills of lading and clearing at the Custom House * * *." The ship cleared and was ready to sail when the charterer went bankrupt and his trustee disclaimed the charter party. The court held that the ship owners could not recover, and that they had no lien on the cargo for freight, because "the ship never earned freight, and never began to earn freight."

In the cases of *Weir v. Girvin* and *Great Indian Peninsula Railway Co. v. Turnbull*, clauses with respect to freight being

payable "ship lost or not lost", were involved. If the claimant's contention is correct that the phraseology "ship lost or not lost" is intended to prevent in any event a recovery of prepaid freight, and is an extension of the drastic English rule that prepaid freight cannot be recovered if the vessel has started on her voyage and commenced earning freight, then these English cases should have been otherwise decided. The decisions of the English courts in permitting a recovery of the prepaid freight money, or denying the right of the ship to recover freight, necessarily involved the decision that the phrase, "ship lost or not lost" could not be construed to extend the already existing doctrine or to be such a contract as would bar a recovery of prepaid freight in any event. Of course it can make no difference in principle that prepaid freight has not actually been paid over. Consequently the cases which hold that freight cannot be recovered by the ship owner are just as strong authority for the proposition that prepaid freight may be recovered where no freight has been earned as if prepaid freight had actually been paid. The rule does not depend upon any such flimsy ground as the mere mechanical handing over of the money.

It seems clear in the light of these decisions, that, even under the English law under which prepaid freight is not generally recoverable, that rule applies only to losses caused by risks of the voyage, and that in any case in which it can be shown that freight had not commenced to be earned at the time that the freight became due and payable, such advanced freight can be recovered back.

The recent decision of the House of Lords in the case of *Coker & Co., Ltd., vs. Limerick Steamship Company, Ltd.*, 34 Law Times Reports, 18, referred to in the opinion of Judge WARD herein, does not, in the opinion of your petitioner, overrule the decisions in the above-mentioned English cases respecting the questions involved in the case at bar. The only issue litigated in the Coker case was what portion of the charter hire became payable where part of the cargo had been loaded, and as to which some, but not all, of the bills of lading had been signed. None of the Lords in their opinions referred to the earlier decisions of *Ex-Parte Nyholm*, *Weir vs. Girvin*, or *Great Indian Peninsular Railway Com-*

pany vs. Turnbull, and there certainly was no indication that it was the intention of the Lords to overrule or question the authority of those cases.

(c) The insertion of the clause, " ship lost or not lost " in American and English bills of lading has been customary for many years evidently for the purpose of making the American practice (which is also the rule adopted on the continent of Europe) conform with the English decisions respecting prepaid freight, and, as we have seen, the English decisions upon contracts containing the " ship lost or not lost " clause do not prevent the recovery of prepaid freight where no freight has been earned or commenced to be earned. It seems clear that such a clause should be given no greater effect than it is given by the English decisions.

Under the American law, it may be possible for the parties so to express themselves as to make prepaid freight an unconditional payment in consideration of loading the goods on board. Such is the intimation in *National Steam Navigation Company v. International Paper Company*, 241 Fed., 861. That was a libel by the ship owner to recover freight payable by the bill of lading under the following conditions :

> " It is hereby expressly agreed that the freight and primage (as per margin) having been prepaid by the shippers, became wholly due, and belonged absolutely to the steamer, without recovery, upon the receipt of the goods into the custody of said steamer, ship lost or not lost.
>
> " * * * Freight to be paid, if payable by shippers, is due in full on signing of the bills of lading ; if payable by the consignees, on arrival of the goods at the port of discharge ; settlement in either case to be made in exchange for bill of lading or delivery order.
>
> " Also that the freight prepaid will not be returned, goods lost or not lost."

The ship sailed but was lost. The Court held that the ship owners could recover the freight under the terms of the bill of lading. Judge WARD said on page 863 :

> " In this particular bill the intention that freight is payable, goods lost or not lost, is prominent throughout. * * * If * * * ' due in full ' means payable in

> full of a previously existing obligation then it makes no difference whether the bill of lading is signed before or after the goods are lost. This is consistent with the primary intention that runs through the whole bill of lading, that all risk of loss of the ship or goods is on the shipper, and with the clause that prepaid freight was wholly due, and belonged to the steamer upon receipt of the goods, ship lost or not lost. We so construe this bill of lading."

It will be noticed that this decision is placed wholly upon the construction of this particular bill of lading and that the language therein used is very strongly in favor of such a construction. *Nevertheless, the question when freight commenced to be earned was in no way before the Court, because the ship had actually sailed.* All that the case decides, therefore, is that prepaid freight is recoverable by the ship (and conversely not recoverable by the shipper) where the parties have made an express agreement to that effect.

In *The Queensmore*, 53 Fed., 1022, cattle were shipped, freight to be payable upon delivery at port of destination, ship lost or not lost, according to the bill of lading. The ship sailed and was lost. It was held that the ship owners could recover freight in spite of their failure to deliver, but this was put upon the ground that there had been an absolute guarantee of payment by a previous contract with the shippers. This case is also distinguishable *because the vessel had sailed* and the earning of freight had begun, so that the "ship lost or not lost" clause became operative. All the other cases on this point cited by appellant are also distinguishable for the same reason, namely, that in every case the ship had sailed.

The proposition contended for by the respondent herein is an exceedingly harsh one as respects the shipper of goods and the courts will not maintain the proposition in the absence of language in the bill of lading which is unmistakable in its effect. In the case at bar the forms of the bills of lading were prepared by the representatives of the ship, and therefore the language contained in such bills of lading must be construed most strongly against the ship. Further, the burden in this case is upon the ship owners to show that the language employed was intended to

have the effect claimed by them; and unless this burden is sustained, petitioner's claim should be rejected.

In order to take the case out of the general rule, an express agreement must be clearly and unambiguously expressed to overcome the presumption that freight is payable only on so much of a cargo as is delivered.

Christie vs. Davis Coal & Coke Co., 95 Fed., 837.

The courts are loath to adopt such a construction of the ordinary clause in a bill of lading unless the language of the parties allows of no other, and we believe that *no case can be found in which prepaid freight has been held to be not recoverable because of an express stipulation to that effect, where the ship had not actually started on her voyage*, with the possible exception of the recent decision by the House of Lords in the *Coker* case.

The language now before this court cannot prevent a recovery of freight moneys which have been prepaid where the ship has not commenced her voyage, because there is no declared intention in the phraseology used to prevent such repayment, and the courts have construed clauses similar to this one and in fact, considerably stronger, as not preventing a recovery of prepaid freight.

In *Ocean Steamship Co. v. U. S. Steel Products Co.*, 239 Fed., 823, in which the Circuit Court of Appeals, Second Circuit, affirmed the decision of the lower court on the opinion of Judge SMITH, the bill of lading contained the following language;

> "Freight for the said goods to be paid by the shippers in New York on delivery of bills of lading in cash, without deduction. Prepaid freight is to be considered as earned on shipment of goods and is to be retained by the ship owner, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere."

Although the point was not directly involved, Judge SMITH said on page 827:

> "Inasmuch as proper bills of lading have not been delivered or tendered, it would follow that the libelant

has not become entitled to demand payment of the freight. That result, however, is claimed by libelant to be inconsistent with the other clauses of the bill of lading which provides that prepaid freight is to be considered as earned on the shipment of the goods and is to be retained by the ship owner, vessel or cargo lost or not lost. The bill of lading must be construed as a whole, and whilst prepaid freight might be construed as earned on the shipment of the goods, that is, on the delivery of the goods on the 23rd of February, 1916, within reach of the tackle; yet, although earned, the ship was not entitled to demand payment until it delivered or tendered the bills of lading, and if it was not entitled to demand payment, the respondent was not bound to pay. If the damage to the merchandise was such as to render it incapable of transportation before the commencement of the voyage, then it might be a question whether the libelant was entitled to be paid freight at all, for the considered rule of commercial law is that freight is to be paid for the carriage of the goods. Even if paid in advance it is to be refunded if, from any cause not attributable to the shipper, the goods are not carried, unless there is a special agreement to the contrary.

"The special agreement relied upon by the libelant in this case is that the bill of lading stipulates that the freight is to be retained by the ship owner, vessel or cargo lost or not lost. But that would seem to mean that it was to be retained, once the voyage of transportation was begun, by the loosening of the vessel from her moorings, or the breaking of ground in the heaving up of her anchor, so as to commence her voyage, and would not apply where freight, although actually stowed on board, was unloaded without the voyage having been commenced at all."

It will be noticed that in that case the court expressed the view that the freight money would have to be refunded in spite of the language of the bills of lading which provided that the freight was to be considered *earned upon the shipment* of the goods. In the bill of lading now under discussion the language only is to the effect that freight is to be prepaid and to be "retained and irrevocably, ship and or cargo lost or not lost." The Circuit Court of Appeals, Second Circuit, in your petitioner's case overruled its previous approval of Judge SMITH'S opinion.

The questions involved here was also discussed in the opinion of Judge RELLSTAB in the very recent case of "*The Allanwilde*" in the United States District Court for the District of New Jersey, reported in 247 Fed. Rep., 236, and which case is now before the Supreme Court on four questions certified by the Circuit Court of Appeals for the Third Circuit, which include a request for instructions on points similar to that involved in this case. In the "*Allanwilde*" case the parties had entered into a charter-party for a voyage which provided for the prepayment of freight, the charter-party containing the following provision :

> "Freight to be prepaid, net, on signing Bill of Lading in U. S. gold or equivalent free of discount, commission or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

The vessel left the Port of New York on the voyage but was forced to return under stress of a heavy gale. While she was in the Port of New York after her return, and waiting to make a new start, the order forbiding clearance which is involved in this action was issued and the vessel was not allowed to leave the port. Thereupon an action was brought by the charterer to recover damages for breach of the charter party, the damages claimed being, first, the freight moneys which had been prepaid, $49,745.50, and second, the damages sustained by the charterers because of the necessity of shipping the cargo at higher rates. Judge RELLSTAB held that the charterers might recover back the freight which had been prepaid, but did not allow damages for failure to perform the rest of the charter party, on the ground that there had been a commercial frustation of the enterprise. In connection with the prepaid freight moneys and in considering the clause in the charter party which we have quoted, which is stronger than the one in this case because of the addition of the word "earned", Judge RELLSTAB said :

> "The clause, 'freight earned, retained and irrevocable, Vessel lost or not lost,' cannot mean that the prepaid freight is earned the moment it is paid, regardless of any forwarding of the cargo. The vessel was not

lost and no forwarding of the cargo had taken place. It is conceded that if the embargo had taken effect before the vessel had started on the voyage which proved to be futile, and the ship owner had insisted that the cargo should be retaken by the shipper, the freight money would have had to be returned.

"To my mind, the fact that a futile attempt had been made to forward the cargo gave the ship owner no greater rights when its later attempts to make a new start were frustrated by the government's embargo. To absolve itself at that time of all obligations to forward the cargo mediately or immediately in order to have the use of the vessel for other purposes, it should at least have returned the freight money which had been paid as compensation for its transportation. * * * To permit the ship owner to retain the freight money after insisting on the shipper retaking his cargo would, to my mind, be highly inequitable. Not only would the shipper be denied the benefits which it would have derived had the ship owner carried out the charter-party, but it would also have to pay for services agreed to be performed by the ship owner but not rendered; while the ship owner would in addition to retaining the unearned freight money, have the commercial use of its vessel during the very period it was chartered for the shipper's use. The embargo in such a case, instead of being a detriment, would be a decided benefit—a veritable windfall—for the ship owner. So inequitable would this result be that a court controlled by equitable principles should not be a party to its consummation, unless constrained by strict law."

The "*Allanwilde*" case was appealed to the Circuit Court of Appeals for the Third Circuit, and that Court without rendering a decision has certified to the Supreme Court four questions for instructions as set forth on page 7 of the petition to this Court.

POINT II.

The exception in the bill of lading relating to the restraints of rulers and princes does not apply:

(a) **Because if the freight moneys are recoverable as discussed in Point I, then no liability therefor had arisen at the time the embargo was placed in effect, and the restraint of rulers and princes clause never attached to the question of freight moneys; and**

(b) **Because there was a commercial frustration of the enterprise which dissolved the contract before the freight was paid or payable even under the claimant's contention, and the parties are entitled to be returned to their status quo ante so far as possible.**

(a) The restraint of princes and rulers clause, even more clearly than the clause relating to freight payable, ship lost or not lost, applies only to risks of the voyage, and for the same reasons. It, therefore, can be given no effect. An embargo of this sort has the effect of putting an end to the contract, so that where it prevents sailing the ship can recover nothing in the nature of freight.

Kelly v. Johnson, 3 Wash. C. C., 45, 14 Fed. Cases No. 7672.

In that case an embargo was declared before the ship broke ground, and the captain refused to sign a bill of lading, but gave a receipt. The shipper desired to have his cargo discharged and take possession of it, but the ship owners refused unless they were paid for expenses claimed to have been incurred by reason of having the cargo on board. The plaintiff (who was the shipper) finally paid the sum demanded without prejudice to any future action he might take, and then brought this action to recover back the sum paid. The Court held that it was immaterial that the bill of lading had not been signed,

and that plaintiff could recover. WASHINGTON, Circuit Justice, said :

> " Whether the enforcing law passed on the 9th day of January, 1809, can be construed to dissolve the contract need not be determined ; but if it did, it could not operate further than to discharge the defendants from the claim of damages for not carrying the cargo when the restrictions of the embargo should be removed ; but certainly, not to entitle the defendants to claim freight, or anything in the nature of it, or damages, from the plaintiff."

(b) The general rule, both in England and the United States, is that freight is not earned until there is a right delivery by the ship at the port of destination. This rule is so well settled that it is not necessary to cite authorities. The rule is well illustrated by cases in which the voyage has been broken up for any reason not caused by the shipper. In such a case the ship-owner can recover no freight.

The Eliza Lines, 199 U. S., 119, 130, 134.
Palmer v. Lorillard, 16 Johns., 347, at 356, 361.
The Nathaniel Hooper, 3 Sumner, 542; 17 Fed. Cases, No. 10,032.
The Ann D. Richardson, 1 Fed. Cases, No. 410 (Affirmed in 1 Fed. Cases, No. 411).

These cases go upon the theory of a total or partial failure of consideration, and are in that respect analogous to the more modern doctrine of commercial frustration. This doctrine has been frequently applied, especially in England, since the outbreak of the present war, and is said to apply in all cases of commercial contracts where, from some cause entirely outside the contemplation of the parties, such as the outbreak of war, the joint adventure becomes commercially impossible.

Commercial frustration has been defined by BANKES, L. J., in the case of *Admiral Shipping Co. v. Weidner, Hopkins & Co.;* Court of Appeal, 115 L. T., 814, as follows :

> " Commercial frustration of an adventure by delay means * * * the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfillment of the contract in the only way in which the fulfillment is con-

templated and practicable is so inordinately postponed that its fulfillment, when the delay is over, will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract and for the accomplishment of which object or objects the contract was made."

That was a case of charter for a "Baltic round." The ship was caught in the Baltic upon the outbreak of the present war, and was prevented by the Russian Government from proceeding on her return voyage. The ship owners sought to recover the hire due them under the contract, but the court held that they could recover no moneys which became due after the outbreak of the war. LAWRENCE, J., said:

> "The doctrine is not peculiar to charters; it is applicable to all contracts. No such condition shall be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.
>
> "I think all reasonable commercial men would agree that charters are subject to the condition that the circumstances remain such that chartered services of the ship shall for an unreasonable time be rendered unavailable; that if from no default of either party these services can neither be rendered by the ship owner, nor enjoyed by the charterer for a reasonable time, then the contract shall be at an end."

SWINFEN EADY, L. J., said:

> "Here a contract has been entered into which, by a supervening cause beyond the control of either party, has become impossible in a commercial sense, and the charterers have not, according to the true construction of the written contract, expressly taken upon themselves the risk of such a supervening cause; upon the occurrence of that cause both parties were and are excused from any further performance."

The District Court for the Southern District of New York has held that an order of the Dutch Government prohibiting a vessel from leaving port under a charter for any voyage while the vessel was under charter to the char-

terers or sub-charterers, the order being modified after some months by permitting the vessel to proceed, but under the condition that she should not trade to any port of a belligerent country, constituted a commercial frustration of the enterprise contemplated by the charter party and justified the charterers in abandoning the contract, so that they were absolved from any liability thereunder.

Atlantic Fruit Co. v. Solari, 238 Fed., 217.

See also,

Jackson vs. Union Marine Ins. Co., 31 L. T., 789, L. R., 10 C. P., 125.

Geipel v. Smith, L. R., 7 Q. B., 404.

The effect of such a frustration of the enterprise is to dissolve the whole contract so that the parties may be put back as far as possible into the situation in which they were before the frustration occurred. The effect is the same as if there were a rescission of the contract by mutual consent.

Card v. Hine, 39 Fed., 818.

In that case a ship which was under charter to be at the loading port at a certain time grounded and was slightly damaged before arrival at the port of loading. Rather than be late under the charter she presented herself in time and was refused by the charterer because no insurance could be obtained without a dry-dock inspection. Upon a libel by the charterer for breach of charter-party, it was held that the contract was at an end, neither party being in default, and that the charterer must fail, except that *he could recover advances made by him while the ship was in the port of loading.*

In the case at bar, the frustration of the enterprise occurred on September 28, 1917, before the loading of the petitioner's cargo was completed or any freight moneys became due even under the contention of the respondent. There was, therefore, a total failure of consideration and frustration of the intent of the parties before the freight moneys were paid, and they should be returned to the position which they were in at the time the government order was issued.

POINT III.

Upon the principles involved in this appeal, the District Courts of the Southern District of New York and of the District of New Jersey have held in favor of the contentions of your petitioner, the Circuit Court of Appeals for the Second Circuit has held against your petitioner by a divided Court, and upon appeal from the District Court of New Jersey the Circuit Court of Appeals for the Third Circuit did not pass upon the questions presented, but requested instructions from this Court upon four questions which have been submitted.

It is respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM C. CANNON,
Counsel for Petitioner.

Office Supreme Court, U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 479.

INTERNATIONAL PAPER COMPANY,
Petitioner-Libellant below,

against

SCHOONER "GRACIE D. CHAMBERS," her tackle, etc.;

FLORENCE G. PAYNE,
Claimant.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Brief for International Paper Company, Petitioner.

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(b) Because the same rule applies to prepaid freight in the absence of a clearly expressed contract to the contrary;

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.

No. 479.

INTERNATIONAL PAPER COMPANY,
Petitioner (Libellant below),

AGAINST

SCHOONER "GRACIE D. CHAMBERS,"
her tackle, etc.;

FLORENCE G. PAYNE,
Claimant.

BRIEF FOR INTERNATIONAL PAPER COMPANY, PETITIONER (Libellant Below).

Statement.

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which reversed a final decree of the United States District Court for the Southern District of New York, for $5,986.97 in favor of the petitioner, then the libellant (Transcript of Record, pages 36, 37) after a trial in Admiralty before the Hon. AUGUSTUS N. HAND, United States District Judge (See opinion, Transcript of Record, pp. 33 to 36). Upon appeal to the Circuit Court of Appeals, the decree was reversed by a divided court, Circuit Judge WARD writing the prevailing opinion (Transcript of Record, pp. 40 to 42) and District

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Judge LEARNED HAND writing the dissenting opinion (Transcript Record, pp. 42 to 44).

This libel was brought to recover the sum of $5,845 freight charges paid on October 4, 1917, to the Commercial Forwarding Company on account of 120 tons of paper, consisting of 352 rolls, loaded on the schooner "Gracie D. Chambers", consigned to Bordeaux, France (Transcript of Record, pp. 1-3, 29, 30, libellant's Exhibit 1).

Between September 27 and October 3, 1917, the "Gracie D. Chambers" was lying at the foot of Fifth Street, East River, City of New York, and received a cargo consisting principally of barrels of oil, paper and wire rolls. On October 3, 1917, she moved out into the stream in order to take more cargo, to save wharfage charges and to await clearance (Transcript of Record, pp. 6, 7, 23). The change of position from the dock to the stream was only a change of berth and was not made as the commencement of the voyage. At that time loading had not been completed (Transcript of Record, pp. 6, 7, 23).

The cargo of the libellant was loaded on the schooner between September 27 and September 29 (Transcript of Record, p. 13). On September 28, 1917, an order was issued by the Treasury Department of the United States to the effect that no further clearance would be granted sailing vessels if any portion of their voyage would take them through the War Zone. This order was conveyed by the following telegram to the Collector of Customs at New York City, dated September 28, 1917, signed by the Assistant Secretary of the Treasury :

"WASHINGTON, D. C., 4:25 P. M., September 28, 1917.

COLLECTOR OF CUSTOMS, NEW YORK, N. Y. :

Withhold clearance any sailing vessel if any part of her voyage would bring her within danger zone. Advise shippers when presenting licenses with export declarations that the license will be inoperative if goods are to be shipped on such sailing vessel, and that application to make shipments on such vessels must be made to Bureau Export Licenses.

ROWE.

Received at the New York office of the Telegraph Company at 4:54 P. M."

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The telegram was received by the Collector at New York on the morning of September 29, 1917, and put into effect at once (Transcript of Record, pp. 10, 11).

On October 1, 1917, a sight draft for $6,666.29 for freight charges was presented by the Franklin Trust Co. to T. F. Wilmot & Co., the ship brokers of the libellant (libellant's exhibit 3, Transcript of Record, p. 32). As this amount was incorrect under the arrangement made between the brokers and the Commercial Forwarding Company, which was acting for the "Gracie D. Chambers," an adjustment of the freight charges was made and they were fixed at the sum of $5,845. On October 4, 1917, this amount was paid by T. F. Wilmot & Company for the account of the International Paper Company to the Commercial Forwarding Company on the 4th day of October, 1917 (libellant's exhibit 2, Transcript of Record, p. 31). At the same time a bill of lading on a printed form furnished by the agents of the vessel, the body of which had been filled out by Messrs. T. F. Wilmot & Co., and which was signed by the Master of the vessel, dated September 21, 1917, was delivered to T. F. Wilmot & Co. (Transcript of Record, pp. 7, 9). This bill of lading contained the following clauses:

> "Restraints of Princes and Rulers * * * excepted."
>
> "Freight to be prepaid in full without discount, retained and irrevocably, ship and/or cargo lost or not lost" (libellant's exhibit 1, Transcript of Record, pp. 29, 30).

It appears that Messrs. Smith & Crawford, who were doing business as Commercial Forwarding Company (Transcript of Record, p. 14) had knowledge that the order of the Treasury Department was in effect prior to the time that they received the freight money from the libellant's agents on October 4, 1917. On October 1, 1917, they read articles in the newspapers stating that there were rumors of an order which forbade the clearance of sailing vessels where the voyage required passage through the War Zone, and on either September 29 or October 1, a man from the office of the Commercial Forwarding Company (who was not produced on the trial) went to the office of the Collector of Customs at New York for the purpose of ascertaining the terms of such order, and he made a report the next day

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(Transcript of Record, pp. 27, 28). His testimony was not produced and it must be presumed that he made a correct report of the results of his investigation.

It further appears that Messrs. Smith & Crawford conferred with their counsel on October 1, 2 and 3, 1917, regarding the order forbidding the clearance of sailing vessels, and that on October 2 or 3, 1917, which was a day or two before the freight moneys were paid, they ascertained that such order was actually in effect, and that they were then advised by their counsel to make every effort to clear the vessel at once (Transcript of Record, p. 28).

In addition to this there is in evidence the Eighth paragraph of the answer of Messrs. Smith & Crawford, doing business as the Commercial Forwarding Company, as claimants, in a libel in Admiralty, filed by Oscar L. Richard and others, against the "Gracie D. Chambers," in the United States District Court for the Eastern District of New York. This answer was verified by both Messrs. Smith & Crawford, and contains a statement that they, as claimants in that proceeding, knew of the order and embargo on October 1, 1917. This answer, according to the testimony of Mr. Crawford, was prepared by Mr. Leech, as their Proctor, after several telephone conversations with Mr. Crawford, in which Mr. Crawford told Mr. Leech everything he knew concerning the facts in the matter (Transcript of Record, pp. 16–18, 22). Judge HAND found that Messrs. Smith & Crawford had knowledge of the order forbidding clearance before accepting the libellant's freight money (Transcript of Record, p. 34).

Because of the fact that the vessel was waiting for more cargo, and for payment of the freight involved in this suit, the master of the vessel did not receive instructions or attempt to secure clearance of the vessel until October 5, 1917 (Transcript of Record, pp. 7, 19, 21-23, 26). Clearance was denied the master by the Collector of Customs under the order received by him on September 29, 1917. Although the Commercial Forwarding Company attempted to have an exception made in the case of the "Gracie D. Chambers", its application was refused on or about October 10 or 11, 1918, and the Commercial Forwarding Company informed the owners of the cargo that the voyage had been abandoned on account of the refusal of clearance, and that the cargo would be redelivered

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or stored for the account of the owners thereof, at their own cost and responsibility (Transcript of Record, pp. 2–5, 28, 29).

T. F. Wilmot & Company, who acted as brokers for the libellants, had no definite knowledge of the existence of the order forbidding clearance until this case arose. At the time that the freight moneys were paid on October 4, 1917, Mr. Thiel of that firm, had heard rumors of the order and asked Mr. Smith of the Commercial Forwarding Company whether the vessel would go forward and was informed that she would (Transcript of Record, pp. 10, 19).

The claimant Payne was the vendor of the vessel under a conditional bill of sale. The payments provided for in the bill of sale had not been completed and she claims title to and possession of the vessel (Transcript of Record, p. 14, Claimant's Exhibit A, pp. 32, 33).

Specification of Errors.

1. The Circuit Court of Appeals for the Second Circuit erred in holding that the bill of lading clause " Freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost," entitled the ship to retain the prepaid freight moneys of your petitioner.

2. The Circuit Court of Appeals of the Second Circuit, erred in holding that the bill of lading clause " Restraints of Princes and Rulers excepted " entitled the ship to retain the prepaid freight moneys of your petitioner.

3. The Circuit Court of Appeals for the Second Circuit, erred in holding that the prepaid freight moneys could not be recovered back by libellant even though the Schooner " Gracie D. Chambers " had not broken ground for her voyage.

4. The United States Circuit Court of Appeals for the Second Circuit, erred in holding that the contract contained in the bill of lading entitled the ship to retain the prepaid freight moneys.

5. The United States Circuit Court of Appeals for the Second Circuit, erred in reversing the decree of the District Court of the United States for the Southern District of New York.

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ARGUMENT.

POINT I.

Petitioner is entitled to recover the prepaid freight :

(a) **Because there is no inception of the earning of freight until the ship breaks ground for the voyage.**

(b) **Because the same rule applies to prepaid freight in the absence of a clearly expressed contract to the contrary.**

(c) **Because the provisions of this bill of lading cannot be construed to be such a contract.**

POINT II.

The exception in the bill of lading relating to the restraints of rulers and princes does not apply :

(a) **Because the clause only exempts the ship from liability for failure to carry and does not relate to freight moneys ; and**

(b) **Because there was a commercial frustration of the enterprise before the freight was paid or payable, and the petitioner is entitled to restitution.**

POINT III.

The decree of the Circuit Court of Appeals should be reversed and the decree of the District Court should be affirmed.

POINT I.

Petitioner is entitled to recover the prepaid freight:

(a) **Because there is no inception of the earning of freight until the ship breaks ground for the voyage.**

(b) **Because the same rule applies to prepaid freight in the absence of a clearly expressed contract to the contrary.**

(c) **Because the provisions of this bill of lading cannot be construed to be such a contract.**

(a) Both in England and in the United States the inception of the earning of freight occurs at the time the vessel breaks ground for her voyage, and not upon receiving cargo on board or doing any act preparatory to sailing.

There can be no breaking of ground for the voyage until after the vessel has secured clearance and has completed all acts necessary and preliminary to sailing. A change of berth from the dock to the stream pending the completion of such preliminaries does not constitute breaking ground for, or a commencement of, the voyage.

Gilchrist Transportation Co. v. Boston Ins. Co., 223 Fed., 716.

See also

Wood v. Hubbard, 62 Fed., 753.

It is well settled law in this country that freight is not earned, or commenced to be earned, until the vessel breaks ground or starts upon her voyage. Breaking ground for the voyage does not occur until the vessel moves with the intention of leaving the harbor on her voyage. The leading case on the subject is *The Tornado*, 108 U. S., 342. In that case the ship was lying at her dock in New Orleans loading a cargo of cotton. Before she had finished loading fire broke out on board, which resulted in the sinking of the ship at her dock, so that she was unable to make her voyage. Part of the cargo was saved, and sold by order of the court.

The shipowners then sought to recover freight from the shippers for that part of the cargo which had been put aboard. It was held by the Supreme Court of the United States that there could be no recovery as no freight had been earned or could have commenced to be earned until the ship broke ground for the voyage.

Mr. Justice BLATCHFORD said, on page 349 :

> " We are of opinion that by the disaster which occurred before the ship had broken ground or commenced to earn freight, circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. * * * All the fundamental conditions forming part of the contract of the shipowner were wanting at the time when the earning of freight could commence. * * *
>
> " It is an inherent element in a contract of affreightment under a bill of lading that the vessel shall enter on the voyage named, and begin the carriage of goods shipped, or, as it is technically called, break ground, before a claim to freight money can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods."

The English leading case is *Curling v. Long*, 1 Bos. & Pull., 634. In that case the ship while lying in harbor at Jamaica was cut out by French privateers and carried to sea. She was later captured by a British ship and carried into a nearby port where her cargo was sold. Suit was brought by the shipowner for the freight moneys. It was held that since she had not broken ground for her voyage, no freight could be recovered by the shipowners because no freight had been earned.

Certain obligations on the part of the vessel, such as the liability of a bailee or carrier, arise upon delivery to it of the cargo, and actions for damages for breach of contract such as were involved in *Bulkley vs. Naumkeag Co.*, 24 Howard, 386, and *Scott vs. The Ira Chaffee*, 2 Fed., 401, referred to in Judge WARD'S opinion would arise. But the rights or obligations in respect of the payment of freight moneys and the maritime lien therefor do not arise until the commencement of the

voyage. This Court, in *The Tornado*, 108 U. S., 342, and the cases upon which we rely under this point, affirm the doctrine that freight is paid for actual transportation and not for receiving the cargo.

(b) As regards the recovery of *prepaid* freight by the shipper where the voyage has been begun but the cargo has not been delivered, the English and American rules differ. In the United States, if the freight is prepaid and the voyage has commenced, it may be recovered back in the absence of an express stipulation to the contrary, if there is a failure to deliver the cargo. This is also the law of the continent.

Burn Line v. U. S. & A. S. S. Co., 162 Fed., 298.
The Kimball, 3 Wallace, 37, 45.
DeSola v. Pomares, 119 Fed., 373.
Watson v. Duykinck, 3 Johns. (N. Y.), 335.
Mitsui v. St. Paul Fire Ins. Co., 202 Fed., 26.
National Steam Nav. Co. vs. International Paper Co., 241 Fed., 861, at p. 862.

In "*The Kimball*" case, *supra*, Mr. Justice FIELD, who wrote the opinion for the Supreme Court of the United States, said as follows:

> "The notes were given before the termination of the voyage, and, consequently, before the balance of the charter-money became due. Treating them as an advance of a portion of the freight, they could be recovered back, or their amount, if paid, if the vessel did not arrive. Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded, if from any cause not attributable to the shipper the goods be not carried."

In England, prepaid freight, in the absence of express agreement, need not be refunded *if the ship has sailed*, even though there is a total failure to deliver the cargo.

Byrne v. Schiller, L. R., 6 Exch., 319.
Allison v. Bristol Ins. Co., 1 App. Cas., 209, 224.

The doctrine was criticized by the Court of Exchequer Chamber in the *Byrne* case but it was said to be so strongly established in England that it would not be departed from.

It became the practice to insert clauses in both American and English bills of lading providing that prepaid freight moneys might be retained " ship lost or not lost ", the clause varying in form from time to time. This custom, which has existed for many years, has evidently been for the purpose of making the legal effect of such a stipulation conform with the English decisions respecting prepaid freight.

The decisions in England held that even where there was such a stipulation the recovery of prepaid freight depended on whether or not the voyage had commenced and the freight moneys had begun to be earned.

Ex Parte Nyholm ; Re Child, 29 Law Times, 634, Chanc. (1873).

Weir & Co. vs. Girvin, L. R. (1900), 1 Q. B. Div., 45.

Great Indian Pena. Ry. Co. vs. Turnbull, 53 Law Times, 325 ; 1 Cab. & E., 595 ; 5 Asp. M. C., 465.

Scrutton on Charterparties and Bills of Lading, 8th Ed. (1917), Art. 137, p. 322.

In the *Great Indian Peninsular Railway Company* case, *supra*, the charter-party contained the following provision : " four-fifths of the freight * * * to be advanced and paid in cash one month from the vessel's sailing * * * (steamer lost or not lost)." The ship sailed, but was lost before one month was up, and the charterers paid the freight with knowledge that the ship had been lost. It was held that the charterer could recover the advanced freight paid by him, notwithstanding the clause " ship lost or not lost ".

DENMAN, J., said :

> " It is contended * * * that the money paid in pursuance of this clause is paid, not as freight, but as a consideration for taking the goods on board * * *. In my opinion there is nothing to show that the real bargain is other than it is expressed to be in the charter party, namely, that the money should be paid as freight. * * * I think that the freight in so far as it had been paid by the plaintiffs, was clearly a part of their loss, and that they ought to recover it from the defendants."

In *Weir & Co. v. Girvin*, *supra*, two-thirds of the freight was to be " due and paid " when the ship was three days out,

" ship lost or not lost." Part of the cargo was burned at the dock and fire was one of the expected perils, but the ship sailed nevertheless. It was held that no freight on the portion of the cargo burned could be recovered by the ship owners, as it never had commenced to be earned.

COLLINS, L. J., said :

> " It is contended that the freight is finally ascertained as soon as the cargo is put on board, and so fixes once for all the amount of advanced freight * * *. The undertaking expressed in the words ' lost or not lost ' * * * is not an answer, * * * for it is an express provision that the calculation of the probable freight was to be displaced in one event, namely, the loss of the vessel. I agree that the provision for that one event does not cut down the rights of the parties with regard to other events provided for by the charter party."

VAUGHAN WILLIAMS, L. J., said :

> " There was a time in the history of the law after the judgment in *Kirchner v. Venus*, when it was supposed that advanced freight and freight were different * * *. The opinions of the law lords in that case *(Allison v. Bristol Marine Ins. Co., supra)* make it clear that that view was incorrect and that ' freight ', whether used in respect of advanced freight or otherwise, always has the same meaning."

See, also, *Allison vs. Bristol Marine Ins. Co.*, 1 App. Cas., 209.

The case of *Allison vs. Bristol Marine Ins. Co.* finally disposed of the suggestion that there might be a difference between advanced freight and freight, first put forward in *Kirchner v. Venus*, 12 Moo. P. C., 361. The House of Lords held that no such distinction could be drawn and that advanced freight was to be treated in all cases in the same manner as freight payable, in the absence of a controlling agreement to the contrary.

In *Ex parte Nyholm, Re Child, supra*, by the terms of the charter party, the charterers promised to " pay * * * as freight " at a certain rate, " the payment of which is to be in-

come due and be made as follows : £250 to be advanced in cash on signing bills of lading and clearing at the Custom House * * *." This ship cleared and was ready to sail when the charterer went bankrupt and his trustee disclaimed the charter party. The Court of Chancery held that the ship owners could not recover, and that they had no lien on the cargo for freight, because "the ship never earned freight, and never began to earn freight."

In the cases of *Weir v. Girvin* and *Great Indian Peninsular Railway Co. v. Turnbull*, clauses with respect to freight being payable "ship lost or not lost," were involved. If the claimant's contention is correct that the phraseology to the effect that freight due prepaid "ship lost or not lost" is intended to prevent in any event a refund of prepaid freight, and is an extension of the drastic English rule that prepaid freight cannot be recovered back if the vessel has started on her voyage and commenced earning freight, then these English cases should have been otherwise decided. The English decisions in permitting a refund of the prepaid freight money, or denying the right of the ship to recover freight, necessarily involved the decision that the phrase, "ship lost or not lost" could not be construed to extend the already existing doctrine or to be such a contract as would bar a recovery of prepaid freight in any event. Of course it can make no difference in principle that prepaid freight has not actually been paid over. Consequently the cases which hold that freight cannot be recovered by the ship owner are just as strong authority for the proposition that prepaid freight may be recovered back where no freight has been earned as if prepaid freight had actually been paid. The rule does not depend upon any such flimsy ground as the mere mechanical handing over of the money.

It seems clear that these decisions, even under the English law under which freight prepaid is not generally recoverable, hold that that rule applies only to losses caused by risks of the voyage, and that in any case in which it can be shown that freight had not commenced to be earned at the time that the freight became due and payable, such advanced freight can be recovered back.

The recent decision of the House of Lords in the case of *Coker & Co., Ltd., vs. Limerick Steamship Company, Ltd.*, 34

Times Law Reports, 18, 118 Law Times, 726, does not, we submit, overrule the decisions respecting the questions involved in the case at bar, which were concerned in the abovementioned English cases. The only issue litigated in the *Coker* case was, what portion of the charter hire became payable where part of the cargo had been loaded, and as to which some, but not all, of the bills of lading had been signed. None of the Lords in their opinions referred to the earlier decisions in *Ex-parte Nyholm*, *Weir vs. Girvin*, or *Great Indian Peninsular Railway Company vs. Turnbull*, and there certainly was no indication that it was the intention of the Lords to overrule or question the authority of those cases.

(c) Even if the *Coker* case is a decision to the effect that where there is a clause in the bill of lading similar to that in the case at bar, that prepaid freight moneys cannot be recovered back where the voyage has not been commenced but has been abandoned, this Court should decline to follow such a doctrine, just as, in *The Kimball*, 3 Wallace, 37, it refused to follow the English rule as to prepaid freight where there is no stipulation as to the retention of freight moneys by the ship.

Under the American law, it may be possible for the parties so to express themselves as to make prepaid freight an unconditional payment in consideration of loading the goods on board. Such is the intimation in *National Steam Navigation Company vs. International Paper Company*, 241 Fed., 861, which is the case relied upon in Judge WARD'S prevailing opinion. That was a libel by the ship owner to recover freight payable by the bill of lading under the following conditions:

> "It is hereby expressly agreed that the freight and primage (as per margin) having been prepaid by the shippers, became wholly due, and belonged absolutely to the steamer, without recovery, upon the receipt of the goods into the custody of said steamer, ship lost or not lost.
>
> "* * * Freight to be paid, if payable by shippers, is due in full on signing of the bills of lading; if payable by the consignees, on arrival of the goods at the port of discharge; settlement in either case to be made in exchange for bill of lading or delivery order.
>
> "Also that the freight prepaid will not be returned, goods lost or not lost."

The ship sailed but was lost. The Court held that the ship owners could recover the freight under the terms of the bill of lading. Judge WARD said on page 863:

> "In this particular bill the intention that freight is payable, goods lost or not lost, is prominent throughout. * * * If * * * 'due in full' means payable in full of a previously existing obligation then it makes no difference whether the bill of lading is signed before or after the goods are lost. This is consistent with the primary intention that runs through the whole bill of lading, that all risk of loss of the ship or goods is on the shipper, and with the clause that prepaid freight was wholly due, and belonged to the steamer upon receipt of the goods, ship lost or not lost. We so construe this bill of lading."

It will be noticed that this decision is placed wholly upon the construction of this particular bill of lading and that the language therein used supports such a construction because in that case the freight became wholly due upon receipt of the goods into the custody of the vessel and that the parties by their language intended that such receipt should constitute, in amplification of the usual admiralty rule, a part of the consideration for which the freight moneys were paid. *Nevertheless, the question when freight commenced to be earned was in no way before the Court, because the ship had actually sailed.*

In *The Queensmore*, 53 Fed., 1022, cattle were shipped, freight to be payable upon delivery at port of destination, ship lost or not lost, according to the bill of lading. The ship sailed and was lost. It was held that the ship owners could recover freight in spite of their failure to deliver, but this was put upon the ground that there had been an absolute guarantee of payment by a previous contract with the shippers. This case is also distinguishable *because the vessel had sailed* and the earning of freight had begun, so that the "ship lost or not lost" clause became operative.

The proposition contended for by the claimant herein is an exceedingly harsh one as respects the shipper of goods, and the courts will not maintain the proposition in the absence of language in the bill of lading which is unmistakable in its effect. In the case at bar the forms of the bills of lading were prepared by the representatives of the

ship, and therefore the language contained in such bills of lading must be construed most strongly against the ship. Further, the burden in this case is upon the ship owners to show that the language employed was intended to have the effect claimed by them; and unless this burden is sustained, their claim must be rejected.

In order to take the case out of the general rule, an express agreement must be clearly and unambiguously expressed to overcome the presumption that freight is payable only on so much of a cargo as is delivered.

Christie vs. Davis Coal & Coke Co., 95 Fed., 837.

The courts are loath to adopt such a construction of the ordinary clause in a bill of lading unless the language of the parties allows of no other, and we believe that with the exception of the *Coker* case *no decision can be found, even in England, in which prepaid freight has been held not to be recoverable because of an express stipulation to that effect, where the ship had not actually started on her voyage.*

The stipulation in the bill of lading in the case now before this court cannot prevent a return of freight moneys which have been prepaid where the ship has not commenced her voyage, because there is no declared intention in the phraseology used that the freight moneys were to be paid as a consideration for receiving the goods on board, and the courts have construed clauses similar to the one under consideration and in fact, considerably stronger, as not preventing a recovery of prepaid freight.

In *Ocean Steamship Co. v. U. S. Steel Products Co.*, 239 Fed., 823, in which the Circuit Court of Appeals, Second Circuit, affirmed the decision of the lower court on the opinion of Judge SMITH, the bill of lading containing the following language:

> "Freight for the said goods to be paid by the shippers in New York on delivery of bills of lading in cash, without deduction. Prepaid freight is to be considered as earned on shipment of goods and is to be retained by the ship owner, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere."

Although the point was not directly involved, and this portion of the opinion is now specifically disavowed by the

Circuit Court of Appeals in Judge WARD'S opinion in the case at bar, Judge SMITH said on page 827 :

> " Inasmuch as proper bills of lading have not been delivered or tendered, it would follow that the libelant has not become entitled to demand payment of the freight. That result, however, is claimed by libelant to be inconsistent with the other clauses of the bill of lading which provides that prepaid freight is to be considered as earned on the shipment of the goods and is to be retained by the ship owner, vessel or cargo lost or not lost. The bill of lading must be construed as a whole, and whilst prepaid freight might be construed as earned on the shipment of the goods, that is, on the delivery of the goods on the 23rd of February, 1916, within reach of the tackle; yet, although earned, the ship was not entitled to demand payment until it delivered or tendered the bills of lading, and if it was not entitled to demand payment, the respondent was not bound to pay. If the damage to the merchandise was such as to render it incapable of transportation before the commencement of the voyage, then it might be a question whether the libelant was entitled to be paid freight at all, for the considered rule of commercial law is that freight is to be paid for the carriage of the goods. Even if paid in advance it is to be refunded if, from any cause not attributable to the shipper, the goods are not carried, unless there is a special agreement to the contrary.
>
> " The special agreement relied upon by the libelant in this case is that the bill of lading stipulates that the freight is to be retained by the ship owner, vessel or cargo lost or not lost. But that would seem to mean that it was to be retained, once the voyage of transportion was begun, by the loosening of the vessel from her moorings, or the breaking of ground in the heaving up of her anchor, so as to commence her voyage, and would not apply where freight, although actually stowed on board, was unloaded without the voyage having been commenced at all."

It will be noticed that in that case the court expressed the view that the freight money would have to be refunded in spite of the language of the bills of lading which provided that the freight was to be considered *earned upon the shipment* of the goods, while in the bill of lading now under discussion the language is to the effect that freight is to be prepaid and

to be "retained and irrevocably, ship and/or cargo lost or not lost."

The question involved here was also discussed in the opinion of Judge RELLSTAB in the case of *The Allanwilde* in the United States District Court for the District of New Jersey, 247 Fed. Rep., 236. In that case the parties had entered into a charter-party for a voyage which provided for the prepayment of freight, the charter-party containing the following provision :

> " Freight to be prepaid, net, on signing Bill of Lading in U. S. gold or equivalent free of discount, commission or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

The vessel left the Port of New York on the voyage but was forced to return under stress of a heavy gale. While she was in the Port of New York after her return, and waiting to make a new start, the order forbidding clearance which is involved in this action was issued and the vessel was not allowed to leave the port. Thereupon an action was brought by the charterer to recover damages for breach of the charter party, the damages claimed being, first, the freight moneys which had been prepaid, $49,745.50, and second, the damages sustained by the charterers because of the necessity of shipping the cargo at higher rates. Judge RELLSTAB held that the charterers might recover back the freight which had been prepaid, but did not allow damages for failure to perform the rest of the charter party, on the ground that there had been a commercial frustration of the enterprise. In connection with the prepaid freight moneys and in considering the clause in the charter party which we have quoted, which is stronger than the one in this case because of the addition of the word "earned", Judge RELLSTAB said at page 238 :

> " The clause, 'freight earned, retained and irrevocable, vessel lost or not lost,' cannot mean that the prepaid freight is earned the moment it is paid, regardless of any forwarding of the cargo. The vessel was not lost and no forwarding of the cargo had taken place. It is conceded that if the embargo had taken effect

before the vessel had started on the voyage which proved to be futile, and the ship owner had insisted that the cargo should be retaken by the shipper, the freight money would have had to be returned.

"To my mind, the fact that a futile attempt had been made to forward the cargo gave the ship owner no greater rights when its later attempts to make a new start were frustrated by the government's embargo. To absolve itself at that time of all obligations to forward the cargo mediately or immediately in order to have the use of the vessel for other purposes, it should at least have returned the freight money which had been paid as compensation for its transportation. * * * To permit the ship owner to retain the freight money after insisting on the shipper retaking his cargo would, to my mind, be highly inequitable. Not only would the shipper be denied the benefits which it would have derived had the ship owner carried out the charter-party, but it would also have to pay for services agreed to be performed by the ship owner but not rendered; while the ship owner would in addition to retaining the unearned freight money, have the commercial use of its vessel during the very period it was chartered for the shipper's use. The embargo in such a case, instead of being a detriment, would be a decided benefit—a veritable windfall—for the ship owner. So inequitable would this result be that a court controlled by equitable principles should not be a party to its consummation, unless constrained by strict law."

On appeal from the decree of the District Court in the "*Allanwilde*" case, the Circuit Court of Appeals for the Third Circuit declined to render a decision, and certified four questions to this Court which are now pending before it.

POINT II.

The exception in the bill of lading relating to the restraints of rulers and princes does not apply:

(a) **Because the clause only exempts the ship from liability for failure to carry and does not relate to freight moneys; and**

(b) **Because there was a commercial frustration of the enterprise before the freight was paid or payable, and the petitioner is entitled to restitution.**

(a) The restraint of princes and rulers clause in the case of an embargo of this sort can only have the effect of exempting the ship from any liability to carry. The clause is inserted parenthetically in that part of the contract which has to do with carriers' obligations and does not relate to the provisions as to freight moneys which are found in subsequent clauses of the bill of lading. Under the restraint of princes clause, the carrier may defend against the shipper in an action for damages for not transporting the cargo, but it cannot have the effect of preventing the shipper from recovering unearned freight money. That was not the intention of the parties and the contract does not bear any such construction.

In *Jackson vs. Union Marine Insurance Co.*, L. R., 10 Com. Pl., 125, Baron BRAMWELL, in referring to the exception in the charter party against sea peril, said at page 145 :

> " The exception is an excuse for him who is to do the act and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement ; and if one party may, so may the other."

In *Kelly v. Johnson*, 3 Wash. C. C., 45, 14 Fed. Cases No. 7672, an embargo was declared before the ship broke

ground, and the captain refused to sign a bill of lading, but gave a receipt. The shipper desired to have his cargo discharged and take possession of it, but the ship owners refused unless they were paid for expenses claimed to have been incurred by reason of having the cargo on board. The plaintiff (who was the shipper) finally paid the sum demanded without prejudice to any future action he might take, and then brought this action to recover back the sum paid. The Court held that it was immaterial that the bill of lading had not been signed, and that plaintiff could recover. WASHINGTON, Circuit Justice, said:

> "Whether the enforcing law passed on the 9th day of January, 1809, can be construed to dissolve the contract need not be determined; but if it did, it could not operate further than to discharge the defendants from the claim of damages for not carrying the cargo when the restrictions of the embargo should be removed; but certainly, not to entitle the defendants to claim freight, or anything in the nature of it, or damages, from the plaintiff."

(b) If the contract evidenced by the bill of lading was entered into prior to the order of the Government, it was terminated, or, as it is called, commercially frustrated, prior to the time of the demand for, or the payment of, the freight money. The bill of lading was filled out by petitioner's agents, dated September 21, 1917, and given to the ship owner (Transcript of Record, p. 9). The order of the Treasury Department was issued on September 28, 1917, and placed in effect at the Port of New York on the morning of September 29, 1917 (Transcript of Record, p. 10), which was before the loading of the vessel was completed (Transcript of Record, p. 13) or a demand for the freight moneys was made (Transcript of Record, pp. 13, 32, Libellant's Ex. 3). The signed bill of lading was delivered to shipper on October 4, 1917 (Transcript of Record, p. 9). The obvious purpose of the order was the regulation of traffic by sailing vessels in the war zone, and apparently it was intended that the regulation should continue indefinitely during the war. No clearances to sailing vessels, except to one foreign boat, were thereafter allowed from the Port of New York (Transcript of Record, p. 11).

The contract of shipment not specifying the period of time in which it was to be performed, was to be executed within a reasonable time, and the action of the Treasury Department, obviously not temporary in its nature, and being indefinite as to its existence, was such an interference with the objects of the enterprise as to relieve of performance.

Geipel vs. Smith, L. R., 7 Q. B., 404.
The Kronprinzessin Cecilie, 244 U. S., 12.
The Styria, 186 U. S., 12.

In *Geipel vs. Smith*, L. R., 7 Q. B., 404, a vessel which had been chartered for a voyage from England to Hamburg was prevented from sailing because of the blockade of the Port of Hamburg by the French Fleet. The Queen of England by proclamation enjoined her subjects to strict neutrality and not to commit any violation of the law of nations, which thereby became a prohibition against attempting to run the blockade. The ship-owners refused to allow the ship to load and notified the charterers that they renounce the charter party. In pleas to the declaration for a breach of the charter party the defendant ship-owners set out the facts of the blockade and the Queen's proclamation. The plaintiff charterers demurred to the pleas. The Court of Queen's Bench held the pleas good, and Judge BLACKBURN said at page 412:

> "But I cannot believe that however long the blockade existed, which might be during all the time the war lasted, and therefore might have been for years, the ship and cargo must be kept ready to sail as soon as wind and weather permitted after the blockade was raised. It would be most inconvenient to give such a construction to the contract, and would be to frustrate the very object of such a contract, viz., the speedy transport of the shipper's goods, and the remuneration employment of the shipowner's vessel. I take the effect of such a state of things as an effective blockade of the port of discharge is not merely to excuse delay in the carrying out of the contract, but that after a reasonable time, it relieves the parties, the contract being altogether executory, from the performance of it."

The modern doctrine of so-called commercial frustration has arisen out of the situations frequently created by the

present war. It rests upon the proposition that the objects for which a contract was entered into have been destroyed by some governmental act and that the life of the contract as a commercial venture has thereby ceased.

Admiral Shipping Co. vs. Weidner, Hopkins & Co. (Court of Appeal), 115 Law Times, 814.
Geipel vs. Smith, L. R., 7 Q. B., 404.
Countess of Warwick S. S. Co. vs. Nickel Societe Anonyme, 1918, 1 K. B., 372.
Horlock vs. Beal, 1916, 1 Appeal Cases, 486 (House of Lords).
The Kronprinzessin Cecilie, 244 U. S., 12.
Atlantic Fruit Co. vs. Solari, 238 Fed., 217 (S. D., N. Y.).

Commercial frustration has been defined by BANKES, L. J., in the case of *Admiral Shipping Co. v. Weidner Hopkins & Co. (Court of Appeal); 115 L. T., 814*, as follows, at page 819:

> "Commercial frustration of an adventure by delay means * * * the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfillment of the contract in the only way in which the fulfillment is contemplated and practicable is so inordinately postponed that its fulfillment, when the delay is over, will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract and for the accomplishment of which object or objects the contract was made."

That was a case of charter for a "Baltic round." The ship was caught in the Baltic upon the outbreak of the present war, and was prevented by the Russian Government from proceeding on her return voyage. The ship owners sought to recover the hire due them under the contract, but the court held that they could recover no moneys which became due after the outbreak of the war. LAWRENCE, J., said, at page 822:

> "The doctrine is not peculiar to charters; it is applicable to all contracts. No such condition shall be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.

> "I think all reasonable commercial men would agree that charters are subject to the condition that the circumstances remain such that chartered services of the ship shall for an unreasonable time be rendered unavailable; that if from no default of either party these services can neither be rendered by the ship owner, nor enjoyed by the charterer for a reasonable time, then the contract shall be at an end."

SWINFEN EADY, L. J., said, at page 817:

> "Here a contract has been entered into which, by a supervening cause beyond the control of either party, has become impossible in a commercial sense, and the charterers have not, according to the true construction of the written contract, expressly taken upon themselves the risk of such a supervening cause; upon the occurrence of that cause both parties were and are excused from any further performance."

The District Court for the Southern District of New York has held that an order of the Dutch Government prohibiting a vessel from leaving port under a charter for any voyage while the vessel was under charter to the charterers or sub-charterers, the order being modified after some months by permitting the vessel to proceed, but under the condition that she should not trade to any port of a belligerent country, constituted a commercial frustration of the enterprise contemplated by the charter party and justified the charterers in abandoning the contract, so that they were absolved from any liability thereunder.

Atlantic Fruit Co. v. Solari, 238 Fed., 217.

See also,

Jackson v. Union Marine Ins. Co., L. R., 10 C. P., 125.

Geipel v. Smith, L. R., 7 Q. B., 404.

Horlock v. Beal, L. R., 1916, 1 Appeal Cases, 486 (House of Lords).

Embiricos v. Sydney, Reid & Co., 1914-3 K. B. Div., 45.

The effect of the frustration of an enterprise as set forth in the above cases is to cause the termination of a contract at the time of the frustration, and the parties thereto are absolved from any further performance of the terms of the contract.

Applied to the situation in the case at bar, the freight moneys had not become due nor had they been demanded when the Treasury order was placed in effect, and consequently the petitioner was absolved from the obligation to pay freight moneys on the shipment, just as the vessel was absolved from its liability to carry the cargo. The consideration for the subsequent payment of freight moneys had totally failed and the petitioner is entitled to the return of such moneys.

In *Card v. Hine*, 39 Fed., 818, a ship which was under charter to be at the loading port at a certain time grounded and was slightly damaged before arrival at the port of loading. Rather than be late under the charter she presented herself in time and was refused by the charterer because no insurance could be obtained without a dry-dock inspection. Upon a libel by the charterer for breach of charter-party, it was held that the contract was at an end, neither party being in default, and that the charterer must fail, except that *he could recover advances made by him while the ship was in the port of loading.*

The contention of the claimant that the rights of the parties were at an end and that no recovery can be had for the prepaid freight moneys is not supported by the authorities. The signed bill of lading was delivered and the freight moneys paid five days after the Government order had been put into effect (Transcript of Record, p. 9). When the freight money was paid representatives of the vessel stated that the ship was going forward (Transcript of Record, pp. 10–19). The contract was wholly executory and its performance by the ship having been prohibited by law, moneys paid on account of the contract cannot be retained. This principle has been distinctly held by this Court in numerous cases. In *Spring Co. vs. Knowlton*, 103 U. S., 49, the Court quoted with approval the following language from the opinion of Lord Justice MELLISH, in the Court of Appeal, in the case of *Taylor vs. Bowers*, 1 Q. B. Div., 291, at p. 300 :

> " If the legal transaction had been carried out, the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out ; it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put

everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action ; the law will not allow that to be done."

See also

Pullman's Car Co. vs. Transportation Co., 171 U. S., 138, at p. 151.

Harriman vs. Northern Securities Co., 197 U. S., 244, at p. 296.

Cleveland C. C. & St. L. Ry. Co. vs. Hirsch, 204 Fed., 849.

POINT III.

The decree of the Circuit Court of Appeals should be reversed and the decree of the District Court should be affirmed.

STETSON, JENNINGS & RUSSELL,
Proctors for Petitioner,
15 Broad Street,
New York,
N. Y.

WILLIAM C. CANNON,
R. L. VON BERNUTH,
Of Counsel.

FILED
OCT 8 1918
JAMES D. MAHER,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1918.

INTERNATIONAL PAPER COMPANY,
Petitioner,

AGAINST

The Schooner "GRACIE D. CHAMBERS," her tackle, etc.; FLORENCE G. PAYNE,
Claimant.

No. 479.

Motion to Advance Case.

SIR: Please take notice that upon the annexed petition and upon the Transcript of Record filed herein, we shall move this Court at the October, 1918 Term thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 28th day of October, 1918, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order directing that the argument of the appeal in this case be advanced and that the same be set down for a day certain to be fixed by the Court.

Dated New York, October 7, 1918.

Yours, etc.,
STETSON, JENNINGS & RUSSELL,
Proctors for Petitioner,
Office and Post-office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

To ROBINSON LEECH, ESQ.,
Proctor for Claimant, 27 Cedar Street, Borough of Manhattan, City of New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1918.

INTERNATIONAL PAPER COMPANY, Petitioner, AGAINST The Schooner "GRACIE D. CHAMBERS," her tackle, etc.; FLORENCE G. PAYNE, Claimant.	No. 479.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petition on Motion to Advance Case.

The petition of International Paper Company, a New York corporation, respectfully shows as follows:

Statement.

1. This suit in admiralty comes before this Honorable Court pursuant to a writ of *certiorari* granted herein and filed with the return from the United States Circuit Court of Appeals for the Second Circuit, with the Clerk of this Court on July 6, 1918.

2. The suit was brought to recover prepaid freight moneys and was tried originally in the District Court of the United States for the Southern District of New York. Cargo belonging to your petitioner was loaded on board the vessel "Gracie D. Chambers" from September 27 to 29, 1917, and the freight moneys were paid by the petitioner to the representatives of the vessel on October 4, 1917, before the vessel had

applied for clearance or broken ground for the voyage. Later the representatives of the vessel notified your petitioner that under the order of the United States Government effective September 28, 1917, forbidding clearance to American sailing vessels bound for the war zone, clearance could not be obtained and that the voyage was abandoned ; and that it would be necessary to unload the cargo. The freight moneys were retained by the representatives of the vessel, and this suit was brought to recover the same. The bills of lading issued for the cargo contained the following clauses : *(a)* " Restraints of Princes and Rulers excepted," and *(b)* " Freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost." These clauses or similar clauses are common in almost all maritime bills of lading.

3. Your petitioner, the libellant in the District Court, was granted a decree for the amount of the prepaid freight moneys. This decree was reversed on appeal by the Circuit Court of Appeals for the Second Circuit, District Judge LEARNED HAND dissenting.

Reasons for Requesting a Preference.

1. The questions presented for decision by the Supreme Court upon the record filed in response to the writ of *certiorari* are concise questions of law.

2. The present case will undoubtedly serve as a test case for many other controversies already pending or about to be brought in the lower courts.

3. The questions raised upon this appeal are peculiar to times of war and invoke the consequences attendant upon Government orders and embargoes during such times. According to the information and belief of your petitioner, at the time the regulation prohibiting the clearance of American sailing vessels for the war zone went into effect, about three or four million dollars in freight moneys were affected by that

order. Later orders restraining clearance of Dutch steam vessels and of sailing vessels carrying certain kinds of cargo in coastwise trade have likewise involved a large amount of prepaid freight moneys. Such orders and embargoes of the Government probably will continue to be made during the pendency of the present war which will affect the right to retain prepaid freight moneys or the liability for freight moneys under bills of lading or charter parties which contain provisions similar to those in the case at bar.

Since the original decision of District Judge AUGUSTUS N. HAND in the District Court in your petitioner's case, the proctors for the petitioner have received numerous inquiries concerning the progress of the cause, from various firms of attorneys, who stated that they had similar questions placed before them by their clients.

Claims have been made of the petitioner on account of other shipments on the said vessel which will be affected by a final decision in this case.

Because questions similar to those raised by your petitioner's case will in all probability continue to arise during the pendency of the present war, a final determination of the law with respect to freight moneys prepaid or to be prepaid under bills of lading containing conditions similar to those above quoted, and where the clearance of the vessel is forbidden by Government orders and embargoes, should be made as early as possible, in order that the conduct of ship owners and cargo owners during the war may be governed thereby.

4. There is now pending before this Honorable Court on certificate from the Circuit Court of Appeals for the Third Circuit the cases of Vacuum Oil Company, libellant-appellee, against the sailing vessel "Allanwilde," Allanwilde Transportation Company, claimant-appellant, No. 449, and A. W. Pidwell, libellant-appellee, against the sailing vessel "Allanwilde," Allanwilde Transportation Company, claimant-appellant, No. 450, which involve questions similar although

not identical with those in your petitioner's case; that a decision in the said *Allanwilde* cases together with the decision in your petitioner's case should practically determine all questions of law arising with respect to prepaid freight moneys where the voyage has been abandoned because of orders or embargoes of the Government.

A motion to advance the said *Allanwilde* cases to the foot of the calendar of October 14, 1918, has been made by the proctors for the claimant-appellant, which has been concurred in by the proctors for the libellant-appellee.

WHEREFORE, your petitioner respectfully prays that this Honorable Court will grant its motion to advance this case on the calendar of this Honorable Court because of the general importance and public interest in the questions involved, and that, if possible, the case be advanced to the calendar of November 11, 1918.

Respectfully submitted,

WILLIAM C. CANNON,
~~Proctor~~ for Petitioner International
Paper Company.

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Supreme Court of the United States

OCTOBER TERM, 1918.

INTERNATIONAL PAPER COMPANY, Petitioner (Libellant below), against Schooner *Gracie D. Chambers*, her tackle, etc., FLORENCE G. PAYNE, Claimant.	No. 479.

BRIEF FOR SCHOONER *GRACIE D. CHAMBERS*.

Statement of Facts.

The facts as set forth in petitioner's brief are sufficiently correct, except that certain evidence has been omitted. Petitioner would have it appear that on October 4th, at the time the freight was paid, it was within the knowledge of Messrs. Smith & Crawford of the Commercial Forwarding Company, representing the vessel, that the *Gracie D. Chambers* could not make the voyage. This is not so. The Treasury Department telegram, which caused the Custom House to refuse to clear the *Gracie D. Chambers*, was not made public, and no one was in-

formed of it until they made application for clearance (Transcript of Record, pp. 10, 11, 12-13). This would seem to dispose effectually of the suggestion on pages 3-4 of petitioner's brief that the Collector of Customs had furnished claimant's representative with any information which was not disclosed.

Certain newspapers contained articles regarding an approaching embargo to take effect on October 15th, and about October 2nd or 3rd published statements that an embargo had been put into effect. These newspaper articles and rumors were known to both parties before the freight was paid; it was admittedly discussed at the time of payment and apparently everyone was satisfied that, as the Government had made no announcement, the schooner would sail as planned (Transcript of Record, pp. 10, 19, 28-29).

On October 5th, after the freight had been paid and the master had gone to clear at the Custom House, the Collector of the Port refused clearance and referred the master to the Export License Bureau of the War Trade Board at 11 Broadway, New York, which in turn referred claimant to the Shipping Board at Washington, in accordance with the Treasury Department instructions. It was not until October 10th or 11th that the refusal of the Shipping Board to permit the *Gracie D. Chambers* to clear or sail made it necessary to discharge her cargo and tender it back to the shippers (Transcript of Record, pp. 7, 10, 28).

The Circuit Court of Appeals sufficiently sets forth these facts in the prevailing opinion by Judge Ward (Transcript of Record, p. 40).

The sole question in the case, therefore, is the effect and construction of the bill of lading.

POINTS.

I.

(a) The bill of lading sets forth the contract between the parties, who expressly accepted its terms and acted thereunder.

(b) The terms of the bill of lading became effective at the time the cargo was shipped, and were in effect at all times up to the date when the vessel abandoned the voyage and delivered back her cargo.

(c) There is no ambiguity, the freight being paid and retained in accordance with the clearly expressed intentions of the parties.

(a) The bill of lading recites that the goods described have been "Shipped in apparent good order and condition * * * in and upon the schooner called *Gracie D. Chambers* * * * and now lying in the Port of New York, and bound for Bordeaux * * * and are to be delivered from the Ship's deck, where the Ship's responsibility shall cease in like good order and condition, at the aforesaid port of Bordeaux (the act of God, * * * Restraints of Princes and Rulers, * * * howsoever excepted), * * * Freight for the said goods, to be prepaid in full without discount, retained and irrevocably ship and, or cargo lost or not lost, at the rate of * * *." There is also a clause whereby it is provided that in "accepting this Bill of Lading, the Shipper, Owner, or other Agent of the Shipper or Owner of the Property carried, ex-

pressly accepts and agrees to all its stipulations and conditions, whether written, printed or stamped as fully as if signed by all of them." The bill of lading is signed Commercial Forwarding Company, by John R. Brown, master, is dated in New York, September 21, 1917, and in large black type has printed the words "Freight prepaid" on its face, the amount of the freight also being calculated and filled in in ink.

The bill of lading having been delivered, the goods shipped thereunder having been received by the vessel and the freight paid, this must be accepted as the contract.

> *The Kronprinzessin Cecilie,* 244 U. S., 12;
> *The Tornado,* 108 U. S., 342;
> *Bulkley* v. *Naumkeag Steam Cotton Co.,* 24 How., 386.

(b) As the opinion of Judge Ward says:

> "It is to be remembered that goods delivered to the carrier even before actual loading aboard are in his custody, and that the maritime engagement is begun, the goods being bound to the ship for the freight and the ship bound to the goods for transportation in accordance with the contract (*Bulkley* v. *Naumkeag Co.,* 24 How., 386; *Scott* v. *The Ira Chaffee,* 2 Fed. Rep., 401)" (Transcript of Record, p. 41).

The liability of the vessel owner or carrier to the shipper which arises immediately the goods are received from the latter is recognized and codified in our law by Section I of the Harter Act (Act of February 13, 1893).

Judge Addison Brown, in the case of *Blowers* v. *One Wire Rope Cable*, 19 Fed. Rep., 444, says, at page 446:

> "I understand the law, as generally administered, to be that the lien of the vessel upon the goods, and of the goods upon the vessel, attaches from the moment the goods are laden on board, and not from the time only when the ship breaks ground."

This Court has also affirmed the same doctrine in *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How., 386, and *The Bird of Paradise*, 5 Wall., 545.

See also:

The Buckingham, 129 Fed. Rep., 975, 976-977;
The Saturnus, 250 Fed. Rep., 407;
Pearce v. *The Thomas Newtown*, 41 Fed. Rep., 106.
The Pokanoket, 161 Fed. Rep., 383; affirmed, 172 Fed. Rep., 321;
Ins. Co. of North America v. *North German Lloyd Co.*, 106 Fed. Rep., 973; affirmed, 110 Fed. Rep., 420;
The Oregon, 1 Deady, 179.

(c) The contract is one of affreightment and carriage, and the considerations expressed in the contract for the payment of the freight are twofold. They are joined together by the use of the word "and." The goods are to be "Shipped"—which was done—"*and* are to be delivered * * * at Bordeaux," subject to certain specified exceptions. The libellant's cargo was loaded between September 27th, 1917, and September 29th, 1917, and the bill of lading was presented through a trust company,

with a draft for the specified amount of freight on the latter date. The condition precedent to payment of the freight was performed. At the time of signing by the master the contract was thus already partly executed by the carrier, a consideration for the freght being expressed in the phrase that the cargo had been "shipped." The prepaid freight was not an advance on account of freight. The word used is "paid," not "advanced." This means that the freight was to be paid as being then due.

> *Mehrbach* v. *Liverpool & Great Western Steam Co.*, 12 Fed., 77, 78-79 (affirmed, 18 Fed. Rep., 192).

In the leading case of *Watson* v. *Duykinck*, 3 Johns, 335, which has been cited with approval by this Court in *The Kimball*, 3 Wall., 37, and by the New York Court of Appeals in *Ogden* v. *N. Y. Mutual Ins. Co.*, 35 N. Y., 418, the agreement between the parties was that "in consideration of $100 to be paid immediately," the defendant, who was master of the sloop *Harriet*, "would suffer the plaintiff to proceed in the sloop as a passenger on the voyage and to load on board for transportation merchandise to the value of $600," and would further provide plaintiff with food, etc., during the voyage. Two days after sailing the sloop sprang a leak and the plaintiff's merchandise was redelivered at the port of loading. Plaintiff brought suit to recover the $100 paid in advance on the ground that the consideration for the freight had failed.

Chancellor Kent delivered the Court's judgment, denying the shipper's right to recover the prepaid freight, saying:

> "The parties agreed that in consideration of $100, to be paid immediately, the one would suffer the other to proceed and go in the sloop, as a passenger, on the voyage, and to load on board, for transportation, merchandise to the value of $600, and that he would also maintain him as a passenger during the voyage. The other party assented and paid the money, and put the goods on board, and proceeded with them as a passenger, until the disaster took place. This agreement did not go the length required by the French law of stipulating that the money should at all events be retained, but it was still particularly confined to the permission to be received on board as a passenger, and to load the goods on board. Both these parts of the agreement were literally complied with. This can easily be distinguished from an agreement to transport and deliver at the place of destination. In the one case, the master places his compensation upon the actual carriage and delivery of the goods. The safe arrival of the subject is a condition precedent to the payment. In the other case, *the consideration is rendered by receiving the goods on board, and making all due and bona fide efforts to carry and deliver them.* I think this latter is, upon the whole, the better construction of the agreement before us, especially as the practice of retaining the advance freight, in all such cases, must have been known to the parties, from the usage which has been found by the jury, and as the distinction between an agreement to receive on board, and an agreement to transport and deliver, *is not a new refinement, but can be traced back to the text of the civil law.* The doctrine is recognized and adopted by va-

rious authors, that if the agreement be to pay freight for the loading of the article on board, the freight is due, though the article perish in the course of the voyage. This is the language of the civil law.

Gothofredus, in his notes on the Digest (Lex Rhodia de Jactu., 14, 2, 10), states the distinction in more clear and explicit terms: *Conduxisti vehenda mancipia; mancipium unum in navi mortuum est; quaeritur, num vectura debeatur? Si de mancipiis vehendis inita conventio est, non debetur; si de mancipiis tantum navi imponendis debetur.*

Molloy (bk. 2, ch. 4, sec. 8) and Abbott (p. 225) seem to have followed the same authorities, but without taking any discrimination between the cases where the money was and where it was not actually advanced beforehand. Perhaps no such discrimination is to be made, though I think the case of the money actually advanced is the stronger case, *as forming superior evidence of the intention of the parties that the freight received should, in every event, belong to the master.*

We conclude, upon the whole view of this case, that Watson, the plaintiff in error, was entitled to retain the freight money, and, consequently, that the judgment below ought to be reversed." (Italics ours.)

Not only is the freight to be *paid*, but it is to be "retained and irrevocably," thus meeting the requirements of the French law referred to in *Watson* v. *Duykinck, supra.* The words "lost or not lost" are properly construed in *Great Indian Peninsular Ry. Co.* v. *Turnbull* (1885), 53 L. T., 325, as limiting the effect of the clause to the excepted perils.

Perhaps no stronger words could be chosen than are used in this bill of lading. There is no question here of whether freight as freight has been earned

or not. This case presents no question as to whether freight is due and payable or whether the carrier is or is not entitled to recover freight from a shipper. Here the two parties provided that the freight should be prepaid, which was done, and further provided that it should be "retained and irrevocably."

The Court below found that the meaning was "perfectly clear" (Transcript of Record, p. 41). A similar suit to the one at bar was brought in the District Court for the Eastern District of New York by another shipper of cargo on this same vessel under a bill of lading containing the same clauses. Judge Veeder decided in favor of the vessel, handing down the following brief memorandum:

> "In view of the express terms of the bill of lading, I see no reason why the freight should be returned."
>
> *Richard* v. *Gracie D. Chambers* (E. D. N. Y.), unreported.

The clause in the bill of lading, "Freight for the said goods to be prepaid in full without discount, retained and irrevocably, ship and, or cargo lost or not lost," is not in its substance an unusual form of arrangement as to the payment of freight. Under the hazardous conditions then confronting merchant shipping, freight was almost always, if not invariably, prepaid. Rates of freight are largely based upon whether the freight is to be prepaid or is to be payable upon delivery of the cargo. Practically, it is largely a question of who assumes the risk from any of the perils excepted in the bill of lading. Where the freight is prepaid, the shipper customarily insures freight as well as cargo, and he or his insurer assumes the risk of non-delivery of the

cargo in order that he may obtain the lower freight rate. The carrier assumes no risk of losing the freight money, provided he does not violate any of the terms of his contract.

See:

> *New York & Cuba Mail Co.* v. *Royal Exchange Assur.*, 154 Fed. Rep., 315 (C. C. A., 2nd).

That case was one of freight insurance, and in holding that the terms in the shipowner's policy, "Freight on board, or not on board," did not include prepaid freight, Judge Wallace remarked:

> "We cannot for a moment suppose that the parties intended to insure property in which the libelant would have no interest" (p. 319).

On the other hand, where freight is payable on delivery, the carrier must assume the risk of being unable to deliver the goods, and in his turn must insure his freight or carry the risk of a frustration of the voyage through an excepted peril. Conditions have been such that risks were great, and in some cases difficult to foresee or insure against. The demand for vessels has been great, and the shipowner has heavy expenses before sailing, such as the cost of his vessel, the cost of loading the cargo, premiums for marine and war risk insurance on his vessel, crew's wages and bonuses, towage, wharfage, pilotage, stevedores' charges, etc. If he can collect prepaid freight, he can meet these expenses before sailing. If he can eliminate the risk of collecting his freight money, if he can assure himself that the freight money can be retained in spite of a frustration through an excepted peril, he can safely fix a lower freight rate.

II.

(a) The parties were free to contract that the prepaid freight could be retained irrespective of whether or not any freight was earned.

(b) The contract, which was legal at its inception, did not become illegal.

(c) The impossibility of further performance was due to a cause expressly provided for by an exception in the bill of lading.

(d) In the absence of a promise to repay, the shipper cannot recover the prepaid freight.

(a) Under the English law prepaid freight is not recoverable if the loss arises from an excepted peril.

Carver, Carriage by Sea (5th Ed.), Secs. 303, 564;
De Silvale v. *Kendal* (1815), 4 M. & S., 37;
Saunders v. *Drew* (1832), 3 B. & Ad., 445;
Trayes v. *Worms* (1865), 34 L. J., C. P., 274.

Under the law of this country prepaid freight is recoverable by the shipper where the goods are not delivered unless the parties contract otherwise. They may, however, so contract that not only prepaid freight may be retained by the carrier where frustration is due to an excepted peril, but that the carrier may collect his freight after the goods be destroyed by making it due and payable upon shipment.

National Steam Nav. Co. v. *International Paper Co.*, 241 Fed. Rep., 861 (C. C. A., 2nd);

Portland Flouring Mills Co. v. *British & Foreign Marine Ins. Co.*, 130 Fed. Rep., 860 (C. C. A., 9th);

The Queensmore, 53 Fed. Rep., 1022 (C. C. A., 4th);

7 *Am. & Eng. Enc. of Law*, 246.

There is nothing inequitable in such an arrangement. The carrier is bound to transport and deliver the goods unless the delivery be frustrated by a peril which both parties have agreed should exempt him from liability. The shipper, by assuming the risk of frustration from such a peril, obtains a lower freight rate. If the goods are delivered, the shipper benefits by the more favorable terms which he has made. If the delivery is frustrated, the carrier benefits by having protected himself against loss of the freight.

Both the learned District Judge and the dissenting Judge in the Circuit Court of Appeals seem to have felt that there was an undue profit accruing to the shipowner who was no longer able to complete his voyage. But it was the action of the United States Government which prevented the vessel from proceeding with the shipper's cargo and delivering it to the consignees. The carrier was anxious to take it forward so that the assumption that the carrier would profit by the frustration seems to be an unnecessary one. Even so,

> "There would be nothing inequitable in this, because it would be profiting by the better bargain it had made with the shippers in the bill of lading."
>
> *Burn Line* v. *U. S. & A. S. S. Co.*, 162 Fed. Rep., 298, at p. 300.

As a matter of fact, the record in this case contains nothing to show that the carrier was to benefit unduly. By the terms of the contract for the purchase of the schooner, the freight collected had to be paid out upon account of the purchase price (see Claimant's Exhibit A, pp. 32-33). In addition the cargo had been loaded and the vessel prepared for sea. All of this would be a dead loss to the carrier if the shipper should recover its prepaid freight. In addition the refusal to permit this vessel to sail for ports in the War Zone necessarily limited her usefulness and would depreciate her value.

The argument of petitioner is based largely upon an attempt to show that freight cannot be recovered as freight by a shipowner if his vessel has not commenced the voyage. Certainly, with one exception, *i.e., The Allanwilde,* 247 Fed. Rep., 236, now under review by this Court, all of the authorities relied upon by petitioner go no further. But that point is not at issue here. The shipowner is not suing for freight, it is not a question of whether he has earned any freight. This suit is brought by a shipper, who asks that the shipowner be compelled to pay back to him—not damages—but money had and received.

The English cases relied upon by petitioner are:

Ex parte Nyholm, In re Child (1873), 29 Law Times, 634;

Weir & Co. v. *Girvin* (1900), 1 Q. B. Div., 45;

Great Indian Pena. Ry. Co. v. *Turnbull,* 53 Law Times, 325.

Ex parte Nyholm, In re Child (1873), 29 L. T., 634, was a case where the shipowner attempted to

assert a lien on cargo for freight under a charter-party which provided "£250 to be advanced in cash on signing bills of lading and clearing at the Custom House, Liverpool." The ship cleared, but the bills of lading were never signed, and the ship never sailed. The condition precedent to the payment of freight was not performed and the Court held that because the bills of lading had not been signed the ship did not have a lien on the cargo for freight under the lien clause in the charter-party.

Weir & Co. v. *Girvin* (1900), 1 Q. B. Div., 45, was another case where the shipowner endeavored to recover freight. In that case the special provisions in the charter-party were "that the freight was to be due and paid as follows:—Two-thirds in cash three days after sailing; ship lost or not lost, the balance on unloading and right delivery of the cargo." After the charterer loaded a part of the cargo a fire destroyed the goods so loaded. Fire was one of the perils mutually excepted by the charter-party. The charterer subsequently loaded the balance of the cargo, and the ship sailed. Three days after sailing the shipowner claimed payment of the advance freight on two-thirds of the cargo shipped. The Court held that the plaintiffs were not entitled to payment of advanced freight on that part of the cargo destroyed. The reasoning of the Court shows that the decision was based upon the fact that the excepted peril constituted a mutual exception, and, therefore, the charterers could not "be called on to ship thereafter cargo in place of that burned or to pay freight in respect of it. There is no further obligation on the charterers and no further right on the shipowner in respect to that portion of the cargo. * * * It is clear, therefore, that as to the 1,478 tons that were destroyed, they were out of the

question before the time came for paying advance freight" (Opinion of A. L. Smith, *L. J.*, pp. 49-50).

In *Great Indian Ry. Co.* v. *Turnbull, supra,* the charter-party provided that four-fifths of the freight was to be advanced one month after sailing. The vessel was lost by a peril not excepted within one month from sailing, but the charterers paid the freight. The Court, after interpreting the phrase "lost or not lost," as stated above, decided that where a vessel was lost during the voyage by a *peril not excepted*, the advance of freight might be recovered as a part of the *damages* for breach of the contract.

Obviously, none of the above cases can be authority for the proposition in support of which they are cited. On the contrary, Vaughan Williams, *L. J.*, in rendering his judgment in *Weir & Co.* v. *Girvin, supra,* expressly recognized the distinction involved in claimant's contention here, which is that the parties have agreed that prepaid freight be retained irrespective of its being *earned.* The learned Justice says, at pages 52-53:

> "It is clearly within the competency of the parties to a charter party, to make stipulations regarding the payment of each part of the freight and they constantly agree that the payment of that part which is payable in advance shall be independent of the delivery of the goods, *or the performance of the voyage* * * *. What has happened in this case is that by reason of fire, which is a matter within a mutual exception clause in this policy, part of the ship has become vacant space not available for the carriage of goods under the charter party." (Italics ours.)

Abbott, in stating the law of England on the subject, says:

> "From Lord Tenterden's time to the present, the right of the ship owner by English law to retain *advanced* freight, notwithstanding the loss of the goods *before the freight is earned*, seems never to have been seriously doubted." (Italics ours.)
>
> *Abbott, Merchant Ships & Shipping* (14th Ed.), p. 664.

Carver in his work on "Carriage by Sea" (5th Ed.), agrees with Abbott, and both cite *Allison* v. *Bristol Marine Ins. Co.* (1876), 1 App. Cases, 209, where, as Abbott says, "This rule of English law was unanimously recognized in the House of Lords." In that case Lord Penzance says, at page 244:

> "An advance of freight is nothing more than an arrangement for the convenience of the ship owner who wants an advance, and if the merchant will make it, is willing to pay the cost of insuring the advance when made, thus practically taking upon himself in another form, the risk which properly belongs to him, of the freight never being earned at all."

The latest reported decision of the House of Lords, is the case of *A. Coker & Co.* v. *Limerick S. S. Co., Ltd.* (1918), 118 L. T., 726, which is squarely against the argument of petitioner and in favor of the shipowner.

In that case a ship was chartered to carry cargo to Archangel, the freight to be payable at the rate of 225 shillings per 20 cwt., delivered, payable on signing bills of lading, less 3 per cent. in Liverpool in cash before sailing. When the ship was loaded

with the exception of about 100 tons on the quay, she caught fire in the docks, and the efforts made to extinguish the fire resulted in her sinking in the dock and sustaining such damage that the cargo had to be discharged and the vessel had to undergo extensive repairs. The voyage was treated as abandoned. The House of Lords held that the shipowner might recover the freight on the cargo loaded. Lord Parker, in concurring, said:

> "My Lords—The question for decision turns entirely on the true construction of the agreement contained in the charter-party. Under this agreement, the cargo is to be delivered at Archangel, or as near thereto as the vessel may safely get, and freight is to be paid at the rate of 225s. per ton delivered, but there is a subsequent clause under which, if the cargo is not of such a nature as to load the vessel to the draught required, the charterers are to pay freight on the guaranteed deadweight, namely, 1950 tons.
>
> Inasmuch as freight is not as a general rule payable until it is earned, the freight under these provisions would not be payable whether at the rate of 225s. per ton delivered, or at the alternative rate of 225s. deadweight capacity, unless and until the vessel had arrived at its port of destination and delivered the cargo. This event never happened, the vessel having sunk in dock before sailing. It is, however, quite a common thing for a charter-party to provide for advance payment in respect of freight, and advance freight, once it becomes due, may be recovered, notwithstanding it is never in fact earned."

This case does not overrule the cases relied upon by petitioner, because they are not inconsistent with the doctrine in the *Coker* case. It is only peti-

tioner's interpretation of those cases which is overruled by the House of Lords.

The American decisions are to the effect that, while freight is never earned until the cargo is delivered and prepaid freight is recoverable by the shipper in the absence of a clearly expressed intention to the contrary, the parties may contract that the freight be due and payable and may be retained by the shipowner irrespective of its being earned. To hold otherwise would unreasonably limit the inalienable right of contract.

National Steam Navigation Co. v. *International Paper Co.*, 241 Fed. Rep., 861;
Burn Line v. *U. S. & A. S. S. Co.*, 162 Fed. Rep., 298;
Portland Flouring Mills v. *British & Foreign Marine Ins. Co.*, 130 Fed. Rep., 860;
The Queensmore, 53 Fed. Rep., 1022;
Benner v. *Equitable Safety Ins. Co.*, 88 Mass., 222;
Chase v. *Alliance Insurance Co.*, 91 Mass., 311;
7 *Am. & Eng. Enc. of Law*, 246.

(b) The action of the United States Government in refusing to permit the *Gracie D. Chambers* to clear for her destination in the War Zone, did not tend to make the bill of lading illegal, but merely to render further performance under the contract illegal, and therefore impossible. To attempt to sail without clearance would have subjected the schooner to liability of capture and seizure or destruction by our own war vessels. Such a restraint is well recognized to constitute impossibility of

performance sufficient to justify and excuse a failure to perform.

Day v. *United States*, 245 U. S., 159;
The Kronprinzessin Cecilie, 244 U. S., 12;
Horlock v. *Beal* [1916], 1 A. C., 486;
Arbit. *F. A. Tamplin S. S. Co., Ltd.*, and *Anglo-Mexican Petroleum Products Co.*, 115 L. T., 315; [1916] 2 A. C., 397;
Admiral Shipping Co. v. *Weidner, Hopkins & Co.* [1917], 1 K. B., 222.

(c) "Restraints of Princes and Rulers" was one of the expressed exceptions in the bill of lading, exempting the carrier from liability to deliver. The action of the United States Government authorities in refusing to permit this vessel to clear for the port of Bordeaux made it unlawful for the vessel to sail and rendered her liable to capture and seizure should she attempt to do so. After that time no clearances were granted to American vessels for ports in the War Zone. In other words, this particular vessel, which was bound to carry this particular cargo to that particular port, has been prevented by the action of a sovereign power from fulfilling the contract, and this amounts to a "frustration."

Atlantic Fruit Co. v. *Solari*, 238 Fed. Rep., 217 (S. D. N. Y.), and cases cited.

The argument that this clause does not apply to the provisions for retention of freight is beside the point. The clause admittedly excuses the failure to deliver the goods at Bordeaux, the failure to carry, and therefore prevents the recovery of damages as for a breach. The exceptions take effect from the

time when the goods are shipped and come into the possession of the vessel.

Bulkley v. *Naumkeag Steam Co.*, 24 How., 386;
National Steam Nav. Co. v. *International Paper Co.*, 241 Fed. Rep., 861.

(d) This suit is for money had and received. The general rule is well settled that where a supervening cause renders further performance illegal, and therefore impossible, the contract is dissolved and neither party is under any further obligation to the other under the contract. The law leaves the parties where it finds them for neither is at fault and both have performed fully up to the time of frustration. The loss lies where it falls and it would be inequitable to penalize either party by imposing any liability upon either.

The Tornado, 108 U. S., 342;
Semmes v. *Hartford City Fire Ins. Co.*, 13 Wall., 158;
Tweedie Trading Co. v. *O'Donnell*, 114 Fed. Rep., 985;
United States v. *Dietrich*, 126 Fed., 671;
Esposito v. *Bowden*, 7 E. & B., 763; 27 L. J. Q. B., 17;
Brown v. *Delano*, 12 Mass., 370;
Palmer v. *Lorillard*, 15 John., 14; S. C., 16 John., 348;
Odlin v. *Ins. Co. of Penn.*, 2 Wash. C. C., 312;
9 *Cyc*, p. 630.

III.

The mandate of the Circuit Court of Appeals should be affirmed.

New York, December, 1918.

Respectfully submitted,

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